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Editor's Note

The Leicester Student Law Review was established to create a space for the student body to interact with legal writing and academia beyond module requirements. It is critical that students are empowered to contribute to the discourse on areas of personal interest and discover the power of their unique student voice. It is my personal mission to ensure the curiosities and passions of the student body are both encouraged and rewarded within the Leicester Student Law Review.

The goal I have set for myself for the duration of my tenure as editor-in-chief is to both empower and honour those around me. This goal is fuelled by my personal experience as an Indigenous woman in law, where all too often, attempts are made to silence my voice and undermine my accomplishments. It is for this reason that I am passionate about using all tools available to me to ensure that everyone's voice is heard, and everyone's accomplishments are honoured. The Leicester Student Law Review functions as an outstanding opportunity to thrust students into the realm of independent research, which can have life-long impacts on their future aspirations.

Volume I of Issue XIII presents valuable contributions to the discourse on a wide range of legal topics. This volume begins with a focus on human rights matters such as medical assistance in dying, the legalisation of homosexual marriage in the United Kingdom, and the necessity of the European Union's Accession to the European Convention on Human Rights. It moves on to critique the present state of the criminal justice system focusing on prison reform, analysing the purpose of punishment, and assessing the present law on consent to bodily harm. The focus then shifts slightly to a comment on the ambiguous borders of criminal liability in sports, and subsequently to a discussion on the tiers of North American law schools and its subsequent impact. It then delves into an analysis on the assumption of liability for environmental damage by parent corporations. This volume then closes off on a look at the impact of colonisation on Canada's Indigenous women.

With such a focus on reform in this volume, it is only appropriate to shed light on the reform that the Leicester Student Law Review has undergone this academic year. The journal has returned to a two volumed series, as was the vision and precedent set by the talented Camilia Amouzegar, Editor-in-Chief of the 2021/2022 Leicester Student Law Review. This return could not have been possible without the outstanding work of the 2023/2024 Law Review team. With an eye to rewarding the student body for utilising their student voice, we have launched the

Leicester Student Law Review Student Voice Award, given to one general submission each volume which has been ranked highest overall through an anonymous vote of the selection committee. To further this endeavour of encouragement, we have also successfully launched the Law Gazette, a division of the Leicester Student Law Review which allows students to explore their unique student voice through a magazine platform, wherein not only their writing can be appreciated, but also their artistry.

The Leicester Student Law Review has always been a great highlight to my academic experience, and I am happy to share with you the outstanding work of my peers, to which I am enormously proud of.

Rebecca Bocchinfuso
Editor-in-Chief
LSLR (2023-2024)

Volume I Issue XIII Contributors

Acknowledgements

We have the utmost appreciation for our supervising faculty members, supporting staff, alumni, and students, who have all made this publication a possibility.

As such, we would like to thank our faculty advisors, Dr. Ewa Zelazna and Dr. Sarah Fox for their unwavering support and guidance throughout the production of this issue.

We thank Dr. Clark Hobson and Dr. Nataly Papadopoulou as well as Dr. Ewa Zelazna for their commitment to selecting the winner of the Gisèle Routhier Memorial Essay Competition.

We would also like to thank Dr. Eugenia Caracciolo Di Torella, Dr. Mandy Burton and Dr. Simran Kalra for selecting the winner of the Family Law Case Brief Competition from the 2023/2024 Family Law formative assignment.

We also acknowledge and thank our academic librarian for the law school, Matt Thompson, for his support in assisting with the training of our editors this academic year.

The quality which has been achieved for this issue would not have been made possible without the astounding precedent set by the brilliant Camilia Amouzegar, Editor-in-Chief of the 2021/2022 Leicester Student Law Review which we are proud to reinstate.

Lastly, we would like to congratulate all authors who have contributed to volume 1 of this issue, as well as all students who submitted their writing for consideration.

Thank you all for your support and dedication to the Leicester Student Law Review.

The Gisèle Routhier Memorial Essay Competition

This essay competition was created in memory of Gisèle Routhier, grandmother to our Editor-in-Chief, Rebecca Bocchinfuso. In the years prior to her passing, Gisèle enjoyed playing hockey, spending time with her family, and enjoying life. She was filled with energy and joy, which shone through in everything she did. In her later years, Gisèle battled with Multiple System Atrophy, a degenerative disorder affecting the nervous system, which ultimately led to Gisèle's decision to undergo medical assistance in dying in Kapuskasing, Ontario, Canada on February 22nd, 2018, at the age of 65.

Gisèle passed peacefully, surrounded by her loving family, and tucked in with a soft blanket. Some of her last words to her family were 'I love you all' before her eyes closed for the last time, and she let out a big, relaxed yawn. While her family watched on in tears, heartbroken by the loss of such a vibrant life, there was a mutual understanding that she was freeing herself from the prison which Multiple System Atrophy had condemned her to.

Immediately after Gisele's passing, her family opened the front door. This was a deliberate request by Gisèle, who indicated that once she was on the other side, her body would work perfectly, and she would run around outside with joy. Medical assistance in dying afforded Gisèle the autonomy to choose how she wished to spend her final days and allowed her family to make preparations for a proper send off to celebrate her life with her.

The purpose of posing this essay question to students was to encourage discourse surrounding medical assistance in dying in the United Kingdom, in hopes that one day others can be afforded the same autonomy that Gisèle was given.

Balancing Autonomy and Protection: Safeguarding Medical Assistance in Dying in the United Kingdom

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I. Introduction

Medical Assistance in Dying (MAiD) is a topic of profound ethical, legal, and societal significance because it stands at the junction of personal autonomy, and it deals with the sanctity of life. This complex subject spark intense legal debates regarding its morality and has resulted in legal amendments and court rulings in numerous jurisdictions worldwide and in the United Kingdom (UK). The current law in the UK on assisted dying, known as the *Suicide Act* (1961), criminalises the act of assisting a person's wishes to terminate their life.[1] Those who assist the suicide of another person can be liable to imprisonment for up to fourteen years. However, there has been a proposed bill, known as the *Assisted Dying Bill* (2021), by Baroness Meacher in which the bill would "enable adults who are terminally ill to be provided at their request with specified assistance to end their own life."[2] It is currently on its second reading at the House of Lords.

This essay explores a hypothetical scenario wherein the UK legalises MAiD, delving into the potential safeguards that can be implemented to ensure it upholds ethical, and legal standards. More specifically, it will explore the justification of implementing such safeguards, as well as its contrasting viewpoints. These inherent safeguards are designed to protect patients and healthcare providers while conforming to existing general practices in hospitals. To support this scenario, this essay will look upon other countries legislations and peer-reviewed journals that have legalised the practice of MAiD, acknowledging the fact that each of these countries have different practices and institutions but can be applicable to the UK as well. This essay proposes five essential safeguards that should be in place if MAiD is legalised in the UK. The proposed safeguards are eligibility criteria, informed consent, multiple assessments, conscientious objection and finally, review boards.

II. Need for Safeguards in UK's Potential Legalization of MAiD

[1] Suicide Act 1961, s 2.
[2] Assisted Dying Bill HL Bill (2021-22) 13.

The rationale behind implementing safeguards for MAiD stems from the need in balancing patient autonomy and protecting those that can be considered as vulnerable populations. The vulnerable population referred to in this essay are terminally ill patients considering MAiD. There needs to be a systematic approach in implementing these safeguards because they are considered as ethical guardrails to prevent potential abuses or undue influence from those that are not terminally ill. Upholding patient autonomy acknowledges that individuals have the right to make end-of-life decisions based off their values and choose a dignified death they see fit. Patients that should be offered options and allowed to make voluntary choices about potentially life-changing health care interventions is important. It discourages some inappropriate paternalism and protects the patients from unwanted intervention.[3] Simultaneously, these safeguards are designed to ensure that both the patients and those involved in the MAiD process are protected. The patients would be protected from coercion, and misjudgments while the healthcare professionals are protected by ethical frameworks that align with their conscience and professional responsibilities.

Since MAiD deals with the sanctity of life, it prompts a re-evaluation of dignity and autonomy, and how much medical intervention is necessary. Ethically, these safeguards are intended to encompass the issues of autonomy, suffering and moral obligations of health professionals while adjacent against coercion and potential exploitation of the vulnerable population. The legal frameworks must address the eligibility criteria, informed consent, multiple assessments, conscientious objection, and the role of review boards to maintain ethical standards and ensure compliance with established regulations. The purpose of these legal frameworks is to ensure that they comply with medical ethics and prevent potential abuses to this system.

By establishing the rationale and need for effective safeguards, both ethically and legally, this paper will now explain what each of those safeguards are.

III. Essential Safeguards for UK's MAiD Legislation

1. Eligibility Criteria: Defining Patient Qualification and Criteria

The first safeguard that is proposed is determining an eligibility criterion. Establishing a clear and comprehensive eligibility criterion would serve as the foundational standards of determining who qualifies under MAiD and in what circumstances. It is important to

[3] Vicky Entwistle and others, 'Supporting Patient Autonomy: The Importance of Clinician-Patient Relationships' (2010) 25 Journal of General Internal Medicine 741, 741.

emphasise that all conditions must be met to be eligible. The following are three key eligibility criteria that need to be met:

A. Terminal Illness

Terminal illness is the most significant criteria that will need to be considered because it limits the scope of patients to those that have serious and incurable diseases and are expected death within a specific timeline. In all jurisdictions in which MAiD is currently permitted, the requestor must have an incurable disease or illness and either intolerable suffering, a short prognosis, or both.[4] This is a fundamental criterion and can be applied to the UK.

B. Minimum Age Requirement

Establishing a minimum age requirement within the jurisdiction is another criterion that can mitigate the risk of anyone requesting it. By restricting the age limit to eighteen and over, it can establish sufficient maturity to make such a profound decision. There are many jurisdictions that use this as an eligibility criterion, such as in Belgium, where it is "legal only for patients over the age of eighteen and for minors over the age of fifteen if they are legally emancipated by a judicial decision."[5]

C. Capacity Decision Making

Having the capacity to make decisions means to be able to understand the relevant information about treatments and being able to appreciate the foreseeable consequences of making that decision. In countries like Netherlands and Belgium, "the capacity criterion is used by physicians to weed out a significant proportion of requests."[6] The purpose of this criterion is to ensure that patients are protected against undue influence or coercion and are making their decision informed and voluntary.

2. Informed Consent: Ensuring Full Understanding and Voluntary Decision-Making

The second safeguard introduced is informed consent because it serves as a critical protective measure for both the patients and healthcare providers. "The goal of the communication and information exchange phrase of informed consent is to ensure the patient has the relevant

[4] James Downer, Susan MacDonald, and Sandy Buchman, 'What Drives Requests for Maid?' (2023) 195 Canadian Medical Association Journal, E1385, E1385.
[5] Penny Lewis and Isra Black, 'The Effectiveness of Legal Safeguards in Jurisdictions That Allow Assisted Dying' (2012) SSRN Electronic Journal, 8.
[6] *ibid* 11.

understanding needed to make an informed decision."[7] By enforcing informed consent, the patients are empowered by having comprehensive information about their condition, available treatments, and the nature of MAiD and they can decide based on their own values and preferences. Additionally, informed consent allows healthcare professionals and hospitals to keep comprehensive records as evidence that due diligence was exercised and that the patient's decision was informed, voluntary and made with full understanding. By obtaining informed consent, it enables open communication between the patient and healthcare providers to address any concerns and provide support. Finally, it is important to outline that a substitute decision maker cannot be applicable in providing consent on behalf of the patient.

3. Multiple Assessments: Professional Evaluations and Oversight

The third safeguard is multiple assessments due to its critical component of ensuring the patient satisfies all eligibility requirements by more than one doctor. These assessments not only evaluate the patient's medical condition but also scrutinises their mental capacity and reconfirms their decision in applying for this procedure. By having multiple healthcare professionals, such as physicians or psychiatrists, it establishes a system of checks and balances while minimising the likelihood of errors in determining their eligibility. In the Netherlands, "the patient must be competent to make such a request and the attending physician must consult a psychiatrist if they suspect if the patient is incompetent."[8] Such a safeguard can strengthen the evaluation process and foster a comprehensive understanding of the patient's situation while mitigating any potential bias during the process. Multiple assessments reaffirm the ethical and legal integrity of the MAiD process within the UK's healthcare system.

4. Conscientious Objection: Upholding Professional Integrity

The fourth proposed safeguard is conscientious objection which prioritises the autonomy of healthcare professionals who may have ethical and moral convictions in doing this procedure. This can allow them to abstain from any involvement in MAiD procedures without facing any punitive measures or discrimination. "The accommodation offered by conscientious objection seeks to protect the moral diversity and moral integrity, in the context if a liberal effort to find ways in which individuals with different reasonable moral outlooks may live together in peace."[9]

[7] Brassfield ER and Buchbinder M, 'Clinical Discussion of Medical Aid-in-Dying: Minimizing Harms and Ensuring Informed Choice' (2021) 104 Patient Education and Counseling 671, 672.
[8] Lewis and Black (n 5) 7.
[9] Massimo Reichlin, 'The Reasonableness Standard for Conscientious Objection in Healthcare' (2022) 19 Journal of Bioethical Inquiry 255, 257.

The significance of this safeguard is to ensure that healthcare professionals are protected from legal consequences while upholding their own individual rights and beliefs. This is beneficial to the patient because it would allow them to meet with healthcare professionals who align with their views regarding the procedure.

5. Review Boards: Ensuring Compliance and Ethical Oversight

The fifth and final proposed safeguard are review boards because they play a pivotal role in serving as guardians of ethical integrity and compliance, overseeing MAID cases to ensure hospitals and healthcare professionals adhere to the legal criteria. They are tasked with independent assessments and have the primary responsibility of reviewing each MAiD request, ensuring the proper protocols are followed. Review boards have a "fundamental governance role in the oversight of quality and safety, by defining priorities and objectives, crafting strategy, shaping their culture, and designing systems of organizational control."[10] This is beneficial as it promotes transparency, accountability and consistent application of the safeguards outlined above.

IV. Challenges in Implementing Safeguards and the Potential Solutions in the UK

The implementation and effective monitoring of these safeguards for MAiD in the UK present intricate challenges across ethical and legal domains. This is because it needs to strike a balance between patient access, safeguarding against potential risks and ensuring it remains inclusive and protective of vulnerable populations. Each of these safeguards require oversight mechanisms, standardised protocols and resources that may not be available across the UK. There are also societal perceptions that need to be addressed as to how each safeguard will affect the public.

Overcoming the potential challenges mentioned above demands a comprehensive strategy that integrates various approaches, ensuring that it has effective monitoring. The strategy entails establishing clear and adaptable guidelines that incorporate input from diverse perspectives and that it balances accessibility and protection, for both the patients and the healthcare professionals. This strategy can help navigate the complexities regarding eligibility criteria, informed consent, multiple assessments, and conscientious objection but will require immense cooperation between legislators, ethicists, and healthcare professionals. By creating robust

[10] Ross Millar and others, 'Hospital Board Oversight of Quality and Patient Safety: A Narrative Review and Synthesis of Recent Empirical Research' (2013) 91 The Milbank Quarterly 738, 739.

oversight mechanisms, such as regular audits and stringent monitoring, will enforce compliance and maintain accountability within healthcare settings. By engaging in public awareness and addressing misconceptions, it can foster societal acceptance and understanding of these safeguards. Through continual evaluation, these safeguards can evolve through the legal and ethical landscapes which is essential for effective implementation and enduring ethical integrity of MAiD in the UK.

The identification of these potential challenges and its potential solutions are important factors to consider in implementing these safeguards, however the next section will undertake a comparative analysis of the countries that have legalised MAiD for many years and how it can be applicable to the UK as well.

V. Comparative Analysis and International Models

A comparative analysis of other international models provides great insights and proof of application. By examining established frameworks from countries such as Belgium, Netherlands, and Canada, it can offer a nuanced understanding of the diverse safeguards and practices associated with MAiD. Each country's model emphasises the proposed safeguards mentioned above and present a spectrum that the UK can draw upon and crafts its own framework. Among the countries mentioned above, the frameworks of Canada and Netherlands closely resemble the legal and ethical landscape of the UK regarding MAiD. Both countries have established safeguards that resemble with what this paper identifies as essential. This includes clear aspects of the safeguards such as eligibility criteria, multiple assessments by healthcare professionals and a strong emphasis on informed consent.[11] They also have a clear mandate on conscientious objection, which is critical for healthcare professionals who have moral convictions in doing this procedure. These elements align with the ethical principles of patient autonomy, rigorous assessment processes and the respect for individual decision-making, which are foundational aspects within the UK's ethical framework. They also align with the legal aspects of what can be established in the UK as well.

It is important to note that the applicability of policies from Netherlands and Canada to the UK would require careful consideration to accommodate UK's unique ethical and legal

[11] Bill C-14 2016 (Canada); Termination of Life on Request and Assisted Suicide (Review Procedures) Act 2001 (Netherlands).

requirements. Taking inspiration of the ethical safeguards from Netherlands and Canada will be beneficial in ensuring the protection of vulnerable patients and healthcare professionals.

VI. Conclusion

The purpose of this essay is to foster a comprehensive understanding of the potential safeguards that can be implemented in the UK, offering insights into the complex interplay between individual autonomy and the need to protect those who may be at risk. The proposal of five fundamental safeguards, eligibility criteria, informed consent, multiple assessments, conscientious objection, and review boards, aims to harmonise patient autonomy and protect those that are considered as vulnerable populations. These safeguards are designed to protect patients from coercion and judgement errors, while also providing ethical guidelines that align with healthcare professional's responsibilities and conscience. Their implementation presents significant challenges in defining eligibility criteria, ensuring informed consent, conducting multiple assessments, addressing conscientious objections, and establishing effective oversight. Overcoming these challenges necessitates a comprehensive strategy that integrates diverse perspectives and ensures effective monitoring, cooperation between legislators, ethicists, and healthcare professionals, and the establishment of oversight mechanisms by review boards. The comparative analysis of international models, particularly Canada and the Netherlands, offers insights into potential frameworks aligned with the UK's ethical principles. These international models showcase foundational aspects like patient autonomy, assessment processes, and the legal frameworks necessary for effective MAiD implementation in the UK. However, the adaptation of these models would require careful consideration of the UK's distinctive ethical and legal landscape. In the scenario wherein UK legalises MAiD, it will bring about great societal debate, but it will also pave a new path in reinforcing patient autonomy. The advancement of science has redefined what end-of-life care options can be, and MAiD presents itself as a critical area of study in legal discourse and requires careful examination, both in the UK and internationally.

Table of Authorities

UK Legislation

Suicide Act 1961

International Legislation

Canada: Bill C-14 2016

Netherlands: Termination of Life on Request and Assisted Suicide (Review Procedures) Act 2001

UK Bills

Assisted Dying Bill HL Bill (2021-22) 13

Secondary Sources

Brassfield ER and Buchbinder M, 'Clinical Discussion of Medical Aid-in-Dying: Minimizing Harms and Ensuring Informed Choice' (2021) 104 Patient Education and Counseling 671

Downar J, MacDonald S and Buchman S, 'What Drives Requests for Maid?' (2023) 195 Canadian Medical Association Journal E1385

Entwistle VA and others, 'Supporting Patient Autonomy: The Importance of Clinician-Patient Relationships' (2010) 25 Journal of General Internal Medicine 741

Lewis PJ and Black I, 'The Effectiveness of Legal Safeguards in Jurisdictions That Allow Assisted Dying' (2012) SSRN Electronic Journal 1

Millar R and others, 'Hospital Board Oversight of Quality and Patient Safety: A Narrative Review and Synthesis of Recent Empirical Research' (2013) 91 The Milbank Quarterly 738

Reichlin M, 'The Reasonableness Standard for Conscientious Objection in Healthcare' (2022) 19 Journal of Bioethical Inquiry 255

Family Law Case Brief Competition

This competition was created in collaboration with Dr. Eugenia Caracciolo Di Torella, LW3250 Family Law module convenor, who has given her permission to have this case brief published in the Leicester Student Law Review. The winning case brief was selected by a panel of academics, consisting of Dr. Eugenia Caracciolo Di Torella, Dr. Mandy Burton, and Dr. Simran Kalra, who made the decision in their sole, unfettered discretion.

Dr. Eugenia Caracciolo Di Torella is an associate professor at the University of Leicester teaching family law, caring and the law, and gender, sexuality, and the law. Dr. Mandy Burton is a professor of socio-legal studies at the University of Leicester, teaching criminal law, criminal justice, and family law, and has conducted extensive research for the UK government in these areas relating to domestic abuse. Dr. Simran Kalra is a lecturer at the University of Leicester in family law and law and society.

All students who submitted their formative assessment in the LW3250 Family Law module (Fall 2023) were automatically entered into this competition, and the student earning the highest overall grade on the assignment was selected as the winner, with the added discretion of the above panel of academics where grades matched.

Honourable mentions go out to Parminder K Rai and Priya Samra.

The Impact of Ghaidan v Godin-Mendoza on the Legitimacy of Homosexual Relationships in the United Kingdom

Rebecca Bocchinfuso, Winner of the Family Law Case Brief Competition (Fall 2023)
Department of Law, University of Leicester, United Kingdom

Facts of the Case

Ghaidan v Godin-Mendoza[12] was decided in 2004 by the House of Lords (HL) by 5 Law Lords. The facts leading to the dispute are as follows: Hugh Wallwyn-James and his partner, Juan Godin-Mendoza, were in a homosexual relationship and resided together in a flat rented in Mr. Wallwyn-James' name. Upon Mr. Wallwyn-James' death, his landlord, Ahmad Ghaidan, commenced possession proceedings against Mr. Godin-Mendoza on the grounds that the rental agreement did not survive on to him because he was not the spouse of Mr. Wallwyn-James within the meaning of paragraphs 2 and 3 of the Rent Act 1977 (RA), which only specified heterosexual couples. The judge at first instance held in favour of Mr. Ghaidan, however, the Court of Appeal disagreed, indicating that the RA was in contravention of the European Convention on Human Rights (ECHR). The decision was subsequently appealed to the HL.

Decision and Ratio Decidendi

The HL, by a 4:1 majority, dismissed Mr Ghaidan's appeal, indicating that the RA put homosexual partnerships at an unlawful disadvantage in contravention of articles 8 and 14 of the ECHR. The Law Lords agreed that the RA breached the ECHR but disagreed on how to remedy the breach. The majority held that the offending provisions of the RA must be read in compliance with the ECHR by virtue of section 3 HRA, such that paragraphs 2 and 3 of the RA included homosexual couples. The majority found that to interpret the RA in this way was not to make any material change to the underlying thrust of the legislation[13], a stark contrast from *Fitzpatrick v Sterling Housing Association Ltd*[14], a previous case with analogous facts. However, Lord Millet, in his sole dissenting judgement, indicated that this was a matter for Parliament to implement, and not the courts. [15]

[12] [2004] UKHL 30.
[13] *ibid* [35].
[14] [2001] 1 AC 27.
[15] *Ghaidan* (n 12) [101].

Critical Analysis

Though this decision marks a turning point in history wherein homosexual relationships begin to gain legitimacy, it is important to consider whether using a purposive interpretation of the RA was the correct approach to mark such a foundational change. Where section 3 HRA is invoked, it is commonplace for criticisms to be raised regarding judicial activism. This is a fair point in the present case, as the words used by Parliament in the RA are unambiguous. Lord Millet rightfully points out that to interpret the RA in accordance with the ECHR would be to contradict the statutory language used.[16] A purposive interpretation which seemingly disregards the words used by Parliament brings uncertainty and undermines the constitutional legitimacy of the decision.[17] Despite such criticisms, following this decision, same sex unions begin to become grounded in the constitutional legitimacy of subsequent Acts of Parliament.

The *Civil Partnership Act* 2004 (CPA) was enacted shortly after *Ghaidan*[18] was decided, with analogous provisions to the *Matrimonial Causes Act* 1973 (MCA) (used for heterosexual couples who marry) as a mechanism to provide social acceptance and legal recognition to same sex couples[19] and remove discrimination[20]. Despite these aspirations, the difference in labeling meant that same sex couples were still subject to an othering as 'civil partners' instead of 'married', which denied them the same status as heterosexual couples, pushing the connotation that same sex relationships are inferior to heterosexual relationships[21]. The image of marriage plays an important role in societal understandings of what a family should look like[22]. Academics have argued that the only way for true equality is to confer the exact same legal rights onto homosexual and heterosexual couples.[23] Such sentiments were refuted by Baroness Hale in *Secretary of State for Work and Pensions v M*[24], wherein she indicated that the CPA does grant same sex couples the same legal recognition that the law grants heterosexual couples, with virtually identical legal consequences of marriage[25]. While the CPA affords same-

[16] *ibid* [71].
[17] Jan Smit, 'The New Purposive Interpretation of Statutes: HRA Section 3 after Ghaidan v Godin-Mendoza' (2007) *MLR* 294.
[18] *Ghaidan* (n 12).
[19] Jacqui Smith (Labour), H.C. Hansard, 12 October 2004, col. 179 and 182.
[20] Nicola Barker, 'Sex and the Civil Partnership Act: The duture of (non) Conjugality?' (2006) *feminist legal studies*, 14:241-259 at p 250.
[21] Nicholas Bamforth, 'The Benefits of Marriage in all but name?' Same-Sex Couples and the Civil Partnership Act 2004 [2007] CFLQ 133.
[22] Alison Diduck and Felicity Kaganas, *Family Law Gender and the State* (Hart, 2006).
[23] Lucy Crompton 'Civil Partnerships Bill 2004: The Illusion of Equality' [2004] *CFLQ* 133 at 829.
[24] [2006] UKHL 2 FLR 58
[25] *ibid* [99].

sex couples an identical legislative framework offered to those in heterosexual relationships, the flagrant exclusion from the institution of marriage is perturbing, given the societal importance and sanctity placed on marriages. Thus, the enactment of the CPA is an unsatisfactory method of achieving equality, despite it being a positive step forward for the recognition of same sex unions.

The *Ghaidan*[26] decision marks a paradigm shift within society concerning same sex relationships, which started a legislative chain reaction, moving towards the recognition of same sex marriage as equal to heterosexual marriage in the eyes of the law. In the years following *Ghaidan*[27] and the CPA, the decision in *Wilkinson v Kitzinger*[28] surfaced, wherein it was argued that the MCA should be read in accordance with articles 8,12 and 14 of the ECHR, by virtue of article 3 HRA, because marriage and civil partnerships were not symbolically equal. However, it was held that although the MCA's exclusion of same sex couples had a discriminatory effect, it was justified on the grounds of it having a legitimate aim, being reasonable and proportionate and fell within the margin of appreciation of signatories to the ECHR. However, as societal views on marriage continued to develop, lawmakers began playing catch up, leading to the enactment of the *Marriage (Same Sex) Act* 2013, thereby allowing same sex couples to legally marry, affording them the same rights and obligations as heterosexual couples as well as the same social status.

[26] *Ghaidan* (n 12).
[27] *ibid.*
[28] [2007] 1 FLR 296.

Table of Authorities

Legislation

Civil Partnership Act 2004

Human Rights Act 1998

Matrimonial Causes Act 1973

Rent Act 1977

International Treaties

European Convention on Human Rights

Case Law

Fitzpatrick v Sterling Housing Association Ltd [2001] 1 AC 27

Ghaidan v Godin-Mendoza [2004] UKHL 30

Secretary of State for Work and Pensions v M [2006] UKHL 2 FLR 58

Secondary Sources

Bamforth N, 'The Benefits of Marriage in all but name?' Same-Sex Couples and the Civil Partnership Act 2004 [2007] CFLQ 133.

Barker N, 'Sex and the Civil Partnership Act: The duture of (non) Conjugality?' (2006) *feminist legal studies*, 14:241-259

Crompton L, 'Civil Partnerships Bill 2004: The Illusion of Equality' [2004] *CFLQ* 133 at 829

Diduck A and Kaganas F, *Family Law Gender and the State* (Hart, 2006)

Smit J, 'The New Purposive Interpretation of Statutes: HRA Section 3 after Ghaidan v Godin-Mendoza' (2007) *MLR* 294

Smith J, (Labour), H.C. Hansard, 12 October 2004, col. 179 and 182

General Submissions

The essays contained within this section showcase the work of authors who have independently submitted their writing for publication. Each essay contained within herein has been selected for publication by the selection committee of the Leicester Student Law Review consisting of our team of editors and our editor-in-chief.

Assessing the Necessity of EU Accession to the ECHR

Mia Worenwu
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Introduction

The European Union (EU) has a longstanding tradition of preserving fundamental rights, as evidenced by cases such as *Solange I*[29] and *Nold*[30]. However, the adoption of the Charter of Fundamental Rights (Charter) by the Lisbon Treaty has subsequently strengthened this commitment. The debate of the necessity of the EU's accession to the European Convention of Human Rights (ECHR) remains one of great contention. This essay explores the history of the EU's approach to fundamental rights, and the issues highlighted by the CJEU's Opinion 2/13 whilst discussing the Court of Justice of the European Union (CJEU) case law. This essay asserts that the contemporary EU legal structure provides sufficient Human Rights protection, rendering EU accession to the ECHR wholly unnecessary.

The Historical Role of the ECHR

The ECHR has predominantly overseen human rights protection under the Council of Europe since World War II. Initially, the EU provided minimal human rights protection, and instead focused on economic mobility.[31] However, the CJEU actively advocated for the EU to protect human rights. Over time, the EU incorporated these principles into its treaties and implemented extensive safeguards for non-discrimination and data privacy.[32]

In 1994, the CJEU held that the EU lacked the competence to accede to the ECHR.[33] The court held that this accession would have constitutional importance and could go beyond the authorities assigned to the EU by the Member States.[34] When the Charter was adopted in 2000, it sparked concerns about establishing two distinct and potentially contradictory systems for protecting human rights in Europe. The latter was a significant change to the EU's approach to fundamental rights. The Charter enumerates several rights, firmly establishing fundamental

[29] *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ('*Solange I*') [1974] 2 CMLR 540.
[30] Case 4-73 *Nold, Kohlen- und Baustoffgroßhandlung v Commission* [1974] ECR 491.
[31] Elspeth Berry, Homewood MJ and Bogusz B, *Complete EU Law* (5th edn, Oxford University Press 2022) 355.
[32] *Ibid.*
[33] *Ibid*, 400.
[34] *Ibid*, 401.

rights as general principles of EU law. The CJEU consistently strives to deliver adequate protection for these rights, demonstrating its ongoing efforts to promote uniformity in fundamental rights protection across the EU. The President of the European Court of Human Rights (ECtHR) raised a concern that duplicating protection schemes may weaken overall human rights protection and legal clarity.[35] As a result, the Treaty of Lisbon amended the Treaty on European Union (TEU) in 2009 to provide the EU with the necessary competence to accede to the ECHR.

Opinion 2/13

The Lisbon Treaty introduced Article 6(2), requiring the EU to accede to the ECHR. This article marked a fundamental shift in the EU's relationship with the ECHR. While this may be a persuasive argument favouring accession, the CJEU's Opinion 2/13 conveyed concerns regarding its conformity with EU law. According to the opinion, the draft Accession Agreement failed to limit Article 53 of the ECHR, which enables states to set better standards of protection than those provided by the ECHR.[36] This apparent clash with Article 53, as explained in the *Melloni*[37] decision, raised queries regarding the need for accession. The *Melloni*[38] decision reaffirmed the supremacy of EU law within the EU legal order, highlighting that national norms cannot compromise the Charter's level of protection or EU law.[39] Furthermore, Opinion 2/13 expressed concerns regarding mutual trust among EU Member States.[40] This issue was not sufficiently addressed in the Agreement, generating concerns about the possible adverse effects on the autonomy of EU law.

The EU's Accession to the ECHR: Analysis

Johan Callewaert argues for Article 6(2), claiming that the present status quo is insufficient, and that EU accession is necessary. He claims that the current system does not sufficiently represent the EU's structure and nature, focusing exclusively on Member States' liability for EU law under the ECHR while ignoring the role of EU institutions.[41] As a result, duties are unbalanced. Due to the informal dialogue between European Courts, dependence on Article

[35] *Ibid.*
[36] *Ibid*, 387.
[37] *C-399/11 Melloni* [2013] 2 CMLR 43.
[38] *C-399/11 Melloni* [2013] 2 CMLR 43.
[39] *Supra* (n 36).
[40] *Supra*, (n 31), 403.
[41] Johan Callewaert, *Do we still need Article 6 (2) TEU? Considerations on the absence of EU accession to the ECHR and its consequences* (Common market law review 55.6 2018) 1685-1716.

52(3), and the ECtHR's surveillance of Member States, Callewaert contends that the current system lacks long-term stability in protecting fundamental rights.[42] Callewaert claims that while such dependence may be helpful, they have considerable disadvantages such as ambiguity concerning enhanced protection under the Charter and limited coverage of cases involving EU institutions.[43] Accession is viewed as a method for ensuring consistent and harmonised protection. According to Callewaert, eliminating the legal necessity for the EU to join the ECHR would weaken the idea of collective understanding and enforcement of fundamental rights, causing the present European framework for safeguarding fundamental rights to fall apart.[44]

Although accession may strengthen the protection of fundamental rights and assure external scrutiny of EU activities, it may jeopardise the EU legal system's autonomy and sovereignty. The ECtHR would need to lose its jurisdiction over mutual trust cases in the Area of Freedom, Security and Justice (AFSJ) to comply with the European Court of Justice's (ECJ) accession demands outlined in Opinion 2/13.[45] In ***MSS***[46], the applicant successfully argued that returning the applicant to Greece would breach Belgium's duties under Article 3 of the ECHR. This was due to inadequate conditions such as housing, basic needs, and healthcare, ensuring humane treatment during the asylum process for asylum seekers in Greece. This then created a danger of cruel and degrading treatment upon repatriation. Belgium was held liable for failing to appropriately examine Greece's human rights status and failed to see the potential violation of the applicant's rights under Article 3. However, following accession, the ECtHR would no longer have jurisdiction over such matter, and it would have to be deemed inadmissible.[47] The same would be true in any hypothetical instance in which a European Arrest Warrant was challenged.[48] "[Accession] would have two detrimental consequences: first, it would lead to a complete lack of external accountability in this ever-growing and highly rights-sensitive field of law; and second, it would divide the state parties to the ECHR into two categories: [1] EU

[42] *Ibid.*
[43] *Ibid.*
[44] *Ibid.*
[45] Tobias Lock, 'The Future of EU Human Rights Law: Is Accession to the ECHR Still Desirable?' (2020) 7(2) JICL 427-447.
[46] *MSS v Belgium and Greece* ECHR 2011.
[47] *Supra*, (n 45), 446.
[48] *Ibid.*

Member States, who enjoy carve-outs of their responsibility and [2] non-EU Member States that do not."[49]

Moreover, the EU has a history of safeguarding fundamental rights and adhering to international human rights conventions. *Solange I* and *Nold* demonstrate the EU's early acknowledgement of the necessity of protecting fundamental rights within its legal order. *Solange I* established the supremacy of EU law over national law, ensuring EU law is applied consistently throughout the Member States.[50] It effectively disputed claims that EU legislation failed to provide appropriate protection, underlining the EU's commitment to human rights protection. The *Nold* judgement emphasised the EU's commitment to upholding fundamental rights in its acts and to find a balance between economic and social interests and fundamental rights.[51] The decision demonstrates the EU's ongoing commitment to human rights protection.

Furthermore, the *Kadi*[52] decision dealt with issues concerning United Nations Security Council (UNSC) decisions. The case emphasised the EU's commitment to preserve human rights even in the face of international duties. The CJEU reaffirmed this priority within the EU legal order, requiring EU institutions and member states to uphold full conformity with these rights.[53] Kadi pioneered the notion of independent judicial review, requiring EU institutions and member states to base their decisions on credible and balanced evidence.[54] The move towards a more rights-centric approach demonstrates the EU's commitment to safeguarding human rights while addressing challenging international responsibilities. The case proved that the current EU legal framework provides a robust basis for protecting human rights.

Conclusion

In conclusion, the arguments favouring accession focus on strengthening human rights protection. However, as demonstrated by the evolution of CJEU jurisprudence and the Charter, the existing EU legal structure offers a sufficient mechanism for defending human rights. The concerns highlighted by the CJEU's Opinion 2/13 indicate that EU accession to the

[49] *Ibid*, 447.
[50] *Supra*, (n 29).
[51] *Supra*, (n 30).
[52] C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.
[53] *Ibid.*
[54] N. Türküler Isiksel, 'Fundamental rights in the EU after Kadi and Al Barakaat' (2010) Vol 16 No. 5 ELJ 551-577.

ECHR may not be critical and thus may jeopardise the distinctive features and autonomy of EU law. The EU would be wise to continue to focus on preserving human rights with adequate protection inside its legislative framework, as it has consistently done without the necessity for accession. This approach achieves a diligent balance between upholding fundamental rights and the EU's legal system.

Bibliography

Primary Sources

Case 4-73 *Nold, Kohlen- und Baustoffgroßhandlung v Commission* [1974] ECR 491.

C-399/11 Melloni [2013] 2 CMLR 43.

C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.

Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel ('*Solange I*') [1974] 2 CMLR 540.

MSS v Belgium and Greece ECHR 2011.

Secondary Sources

Berry E, Homewood MJ and Bogusz B, *Complete EU Law* (5th edn, Oxford University Press 2022) <http://ezproxy.lib.le.ac.uk/login?url=https://www.oxfordlawtrove.com/view/10.1093/he/9780192846419.001.0001/he-9780192846419> accessed 23 October 2023

Callewaert J, *Do we still need Article 6 (2) TEU? Considerations on the absence of EU accession to the ECHR and its consequences* (Common market law review 55.6 2018) 1685-1716 <https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\COLA\COLA2018142.pdf> accessed 23 October 2023

Isiksel N. T, 'Fundamental rights in the EU after Kadi and Al Barakaat' (2010) Vol 16 No. 5 ELJ 551-577 <https://cgt.columbia.edu/wp-content/uploads/2016/03/Fundamental-Rights-in-the-EU.pdf> accessed 31 October 2023

Lock, T, 'The Future of EU Human Rights Law: Is Accession to the ECHR Still Desirable?' (2020) 7(2) JICL 427 <https://www.jicl.org.uk/storage/journals/November2020/DcDX7H0ZjzGfkzXl4MBq.pdf> accessed 31 October 2023

Failings of The Criminal Justice System: Race and Prison

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Our criminal justice system has been described as one which treats the most vulnerable 'as dots and digits on a spreadsheet'.[55] This essay will critically discuss how the criminal justice system has failed in its function to provide justice with a discussion of potential reforms as a mechanism to improve the system. Part one discusses the failures of the system at an institutional level with respect to the police, courts, and prisons. Part two includes recommendations to improve the system, discussing the option to abolish imprisonment for non-serious offences, the focus on reintegration of prisoners into society, and public education.

PART 1-FAILINGS

POLICING

Dame Elish Angioli argues 'Deaths of young black men resonate with the black community's experience of systemic racism'.[56] '[People of color] die disproportionately because of use of force or restraint by police'.[57] A poll published in 2020 found that about 41% of 300 police officers believed that stereotypes are true.[58] These biased views are reflected in the disproportionate stop and search powers[59] used by the police against the black community, which is that they are 10 times more likely to be searched than the white community.[60] Additionally, there are four times higher arrest rates of black children than white children.[61] Stephen Lawrence, who died of a racialized attack by a gang of five white teenagers, was given justice after 19 years of two failed prosecutions, erroneous police investigations, and a public campaign for justice.[62] It was 'a combination of professional incompetence, institutional racism and a failure of leadership by senior officers'.[63] One person of color dies in police custody every two months.[64] Azelle Rodney was shot six times including four fatal

[55] Secret Barrister, *The Secret Barrister: Stories Of The Law And How It's Broken* (Pan Macmillan 2018).
[56] Dame Elish Angiolini, *Deaths and serious incidents in police custody* (Home office 2017).
[57] 'BAME deaths in police custody' (INQUEST,2022).(BAME deaths)
[58] Christien Pheby, *British police oppose positive discrimination for ethnic minorities* (YouGov 2020).
[59] Criminal Justice and Public Order Act 1994, s.60.
[60] Home office, *Stop and search* (2021).
[61] Ministry of Justice, *Youth Justice Statistics 2018/19* (2020)8.
[62] Reni Eddo-Lodge, *Why I'm no longer talking to white people about race* (Bloomsbury 2017) ch2.
[63] Sir William Macpherson, *The Stephen Lawrence Inquiry* (1999).
[64] BAME deaths

shots to the head, unarmed, without an opportunity to surrender.[65] The UK police chief's admission of institutional racism is clear evidence of this problem.[66] Such prejudicial thinking forces the officers to hold already disadvantaged communities guilty before giving them a fair opportunity to defend themselves, thereby violating their right to a fair trial.[67]

COURTS

The 'impartial' courts[68] are ironically not what they stand for. The legal system is manipulated by using ambiguous terms like 'reasonable force', and 'suspicion' to justify state violence by the racialized police officers against victims like Mark Duggan who was unarmed when shot by the police.[69] It is also evident from the mere 10% BAME representatives among magistrates[70] or the black people who are not only three times more likely to be prosecuted and sentenced, [71] but also five times more likely to be put straight into custody once found guilty.[72] This shows how institutional racism exists in courts, which exist in practice as the epitome of impartiality.

PRISON

Prisons have an 'inhumane and inhospitable' environment.[73] Out of 117 prisons, 76 were overcrowded as of May 2017[74], prisoners are made to 'sleep on the floors',[75] 'forced to endure a floor covered in blood following a self-harm incident', or housed in a 'filthy flooded cell'.[76] For some prisoners, living is worse than death, as evident from 67.3% of self-harm incidents in 2021.[77] Instead of providing the high percentage of mentally ill prisoners (26% females and 16% males)[78] with sufficient medical treatment in a safe environment, they are 'left...in a glass cage, twenty-four hours a

[65] Sir Christopher Holland, *The Report of The Azelle Rodney Inquiry* (2013).
[66] Vikram Dodd, *UK police chiefs consider public admission of institutional racism* (The Guardian 2021).
[67] European Convention on Human Rights (ECHR), Article 6.
[68] ibid.
[69] Adam Elliott-Cooper, 'Violence old and new: From slavery to Serco' in Kehinde Andrews and Lisa Amanda Palmer (eds), Blackness in Britain (Routledge 2016).
[70] Penelope Gibbs, *Magistrates: representatives of the people?* (2014).
[71] Equality and Human Rights Commission, *Race report statistics* (2020).
[72] Adam Elliott-Cooper (n 69).
[73] Chris Daw, *Justice on trial: radical solutions for a system at breaking point* (Bloomsbury Continuum 2020).
[74] Ministry of Justice, *Monthly Population Bulletin* (2017).
[75] Daw (n 73).
[76] Peter Clarke, *HM Chief Inspector of Prisons for England and Wales: Annual Report 2018 –19* (2019).
[77] Ministry of Justice*, Safety in Custody Statistics, England and Wales: Deaths in Prison Custody to December 2021, Assaults and Self-harm to September 2021* (2022).
[78] Miriam Light, Eli Grant, and Kathryn Hopkins, 'Gender differences in substance misuse and mental health amongst prisoners' (2013).

day'.[79] This treatment violates their absolute right to the prohibition of torture or degrading treatment contrary to Article 3 of the ECHR.

After serving his sentence, a prisoner is 'released to society physically, but does not rejoin it socially'.[80] He feels 'alienated'[81] and enters the 'vicious circle of reoffending'.[82] Rehabilitation is one of the 5 purposes of sentencing under the Sentencing Act 2020, s.57, and it includes activities like education, workshops, and programs that allow a prisoner to re-integrate and readjust to society upon the completion of their sentence,[83] but it is hardly taken seriously by the prison authorities. Almost three-quarters of men's prisons inspected in 2019-20 were 'inadequate' in their education and work provisions.[84] Prisoners with shorter sentences, having less opportunity for rehabilitation were more likely to reoffend.[85] Only 36% of prisons received a positive rating for including purposeful activity.[86] The under-staffing of prisons has led to 19% of prisoners being routinely locked up during the working day.[87] 'Engagement with education can significantly reduce reoffending', yet there is a drop of more than 32% participation in prison education since 2014-15.[88] The 'antagonistic relationship between prisoners and correctional staff disrupts any ethos of rehabilitation'.[89] From the prisoner's perspective, the programs are 'so poorly put together', and that officers were only 'ticking boxes' or creating an 'illusion of rehabilitation'.[90] Michael's account after spending 90% of his adult life in prison, 'out there, I just can't cope with it', explains how prisoners are left astray upon the completion of their sentence without any life skills to survive and are expected to live as a functioning member of society.[91] The prisoners are ultimately forced to choose between a degrading prison environment or dying in the streets. Disengagement with rehabilitative activities has led to high reoffending rates, ultimately creating more victims.

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[79] Daw (n 73).
[80] Joel Meyer, 'Reflections on Some Theories of Punishment' [1968] vol. 59 Journal of Criminal Law, Criminology, and Police Science 595.
[81] *Ibid.*
[82] Daw (n 73).
[83] Meyer (n 80).
[84] Peter Clarke, *HM Chief Inspector of Prisons-annual report: 2019–20* (2020).
[85] Matthew Halliday, 'Bromley Briefings Prison Factfile: Winter 2022' (Prison Reform Trust 2022). (Bromley Briefings).
[86] *Ibid.*
[87] *Ibid.*
[88] *Ibid.*
[89] Karen Bullock and Annie Bunce, 'The prison don't talk to you about getting out of prison': On why prisons in England and Wales fail to rehabilitate prisoners [2020] 20(1) CCJ 111.
[90] *Ibid.*
[91] Daw (n 73).

PART 2- REFORMS

ABOLISH IMPRISONMENT FOR NON-SERIOUS OFFENCES

Prisons must be abolished because 'More prison means more victims of crime'.[92] 'Using the criminal as a scapegoat only creates further hostility between the criminal and society which may result in future injury to the whole community'.[93] It should only house the most serious offenders, much like the Norway prison model,[94] with one of the smallest prison populations on Earth and the lowest rates of re-offending at 20% compared to 46% in the UK.[95] The offenders of non-violent/less-serious crimes should be given community orders, which have proven to be more effective than short prison sentences with higher re-offending rates.[96] Releasing all of the non-violent offenders with curfews, house arrests, and high surveillance will substantially reduce the extremely high prison budget.[97] This will not only solve the problems of understaffing and overcrowding of prisons, but the funds saved from this budget could be directed into much-needed prison rehabilitation programs, prison medical facilities, and post-prison housing support.

RE-INTEGRATION OF PRISONERS INTO SOCIETY

The main focus should be placed on the day of the prisoner's release when he would want to be accepted by society and not feel alienated.[98] To achieve this, rehabilitation should be promoted by prison staff acting as 'role models... to foster hope and motivation' because the 'staff-prisoner relationship' is at the heart of a 'good prison',[99] it also 'promote[s] desistance'[100], thus reducing reoffending rates. Dame Sally Coates emphasised the importance of prison education, stating that restrictions should not be placed upon prisoners' access to education or library time as placed upon higher category prisoners like A and B.[101] The state should '[normalise] life behind the bars...by ensuring that family contact is maintained'.[102] The prisoners who received family visits are 39% less likely to reoffend than those who do not, and yet arrangements to maintain and strengthen family ties

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[92] *Ibid.*
[93] Meyer (n 80).
[94] 'How Norway turns criminals into good neighbours' (BBC News 6 July 2019) <https://www.bbc.com/news/stories-48885846> accessed 27 April 2022. (Norway model)
[95] Carolyn W. Deady, 'Incarceration and Recidivism: Lessons from Abroad' (Salve Regina University 2014).
[96] Bromley Briefings.
[97] Daw (n 73).
[98] *Ibid.*
[99] Mike Maguire and Peter Raynor, 'How the resettlement of prisoners promotes desistance from crime: Or does it?' (2006) 6(1) Criminology and Criminal Justice 19.
[100] Ros Burnett and Fergus McNeill, 'The place of the officer–offender relationship in assisting offenders to desist from crime' (2005) 52(3) Probation Journal 221.
[101] Dame Sally Coates, 'Unlocking potential: A review of education in prison' (2016).
[102] Norway model.

are 'not given sufficient priority or resources'.[103] This will have a transformative effect on the prisoners, promoting secondary desistance,[104] who would be willing to participate in rehabilitative activities and get on with their lives upon release on a crime-free path. Rehabilitative interventions are highly effective, 'If transition from custody to community is planned and coordinated'.[105] More than 50% of prisoners released in 2020-21 did not have accommodations upon release and 65% of those had reoffended within the year of release.[106] Good quality rehabilitative programs in prison, frequent family visits, and supporting the prisoners upon release should be promoted to encourage desistance, reduce the levels of reoffending, and keep the community safe.

PUBLIC EDUCATION

To tackle the discrimination faced by the racialised communities, citizens should be educated, from an early age, about the history of racialised communities in the UK, and how they have not arrived at the shores in the late 19th century, but instead have been living on this land for as long as the Romans, and that they are as much citizens of this nation as the white community.[107] Sufficient public education is only possible by the decolonisation of education as suggested by L. Le Grange.[108] This is contrary to the views of Dr. Tony Sewell in the CRED report, which suggested that institutional racism does not exist in the UK, and that all communities are in fact treated equally.[109] This analysis, however, refuses to acknowledge that treating all communities equally perpetuates the already existing discrimination on the basis of race. Reni Eddo-Lodge asserts that 'to dismantle unjust, racist structures, we must see race...see who benefits from their race and who is disproportionately impacted by negative stereotypes'.[110] It has been established that institutional racism exists in the criminal justice system, which needs to be uprooted from the base by introducing different sources of knowledge from all over the world into the school curriculum. This will eventually allow people to remove the racial blindfold and acknowledge the disparities faced by racialised communities.

[103] Bromley Briefings.
[104] Shadd Maruna, 'Pygmalion in the reintegration process: Desistance from crime through the looking glass' (2004) 10(3) Psychology, Crime & Law 271.
[105] Kirsty Hudson, Mike Maguire and Peter Raynor, 'Through the prison gate' in Yvonne Jewkes (ed), *Handbook on Prisons* (Willan 2007).
[106] Bromley Briefings.
[107] Peter Fryer and Paul Giltroy, *Staying power: the history of black people in Britain* (Pluto Press 2010).
[108] Lesley Le Grange, 'Decolonising the university curriculum: Leading article' (2016) 30 South African Journal of Higher Education 1.
[109] Commission on Race and Ethnic Disparities, *Commission on Race and Ethnic Disparities: The Report* (2021).
[110] Reni Eddo-Lodge (n 62).

CONCLUSION

The criminal justice system is failing our racially marginalised communities, prisoners, and the public by failing to keep them safe. Necessary steps must be taken to improve the systems by increasing well-funded rehabilitative systems, changing the sentencing system, and educating the public to make the system more just.

Table of Authorities

Legislation

Criminal Justice and Public Order Act 1994, s.60.

European Convention on Human Rights, Article 3.

European Convention on Human Rights, Article 6.

Sentencing Act 2020, s.57

Secondary Sources

'BAME deaths in police custody' (INQUEST 2022).(BAME deaths)

'How Norway turns criminals into good neighbours' (BBC News 6 July 2019) <https://www.bbc.com/news/stories-48885846> accessed 27 April 2022. (Norway model).

Angiolini DE, *Deaths and serious incidents in police custody* (Home office 2017).

Barrister S, *The Secret Barrister: Stories Of The Law And How It's Broken* (Pan Macmillan 2018).

Bullock K and Bunce A, 'The prison don't talk to you about getting out of prison': On why prisons in England and Wales fail to rehabilitate prisoners [2020] 20(1) CCJ 111.

Burnett R and McNeill F, 'The place of the officer–offender relationship in assisting offenders to desist from crime' (2005) 52(3) Probation Journal 221.

Clarke P, *HM Chief Inspector of Prisons for England and Wales: Annual Report 2018 –19* (2019).

Clarke P, *HM Chief Inspector of Prisons-annual report: 2019–20* (2020).

Coates DS, 'Unlocking potential: A review of education in prison' (2016).

Commission on Race and Ethnic Disparities, *Commission on Race and Ethnic Disparities: The Report* (2021).

Daw C, *Justice on trial: radical solutions for a system at breaking point* (Bloomsbury Continuum 2020).

Deady CW, 'Incarceration and Recidivism: Lessons from Abroad' (Salve Regina University 2014).

Dodd V, *UK police chiefs consider public admission of institutional racism* (The Guardian 2021).

Eddo-Lodge R, *Why I'm no longer talking to white people about race* (Bloomsbury 2017) ch2.

Elliott-Cooper A, 'Violence old and new: From slavery to Serco' in Kehinde Andrews and

Lisa Amanda Palmer (eds), Blackness in Britain (Routledge 2016).

Equality and Human Rights Commission, *Race report statistics* (2020).

Fryer P and Giltroy P, Staying power: the history of black people in Britain (Pluto Press 2010).

Gibbs P, *Magistrates: representatives of the people?* (2014).

Grange LL, 'Decolonising the university curriculum: Leading article' (2016) 30 South African Journal of Higher Education 1.

Halliday M, 'Bromley Briefings Prison Factfile: Winter 2022' (Prison Reform Trust 2022). (Bromley Briefings).

Holland C, *The Report of The Azelle Rodney Inquiry* (2013).

Home Office, *Stop and search* (2021).

Hudson K, Maguire M and Raynor P, 'Through the prison gate' in Yvonne Jewkes (ed), Handbook on Prisons (Willan 2007).

Light M, Grant E, and Hopkins K, 'Gender differences in substance misuse and mental health amongst prisoners' (2013).

Macpherson W, *The Stephen Lawrence Inquiry* (1999).

Maguire M and Raynor P, 'How the resettlement of prisoners promotes desistance from crime: Or does it?' (2006) 6(1) Criminology and Criminal Justice 19.
Maruna S, 'Pygmalion in the reintegration process: Desistance from crime through the looking glass' (2004) 10(3) Psychology, Crime & Law 271.

Meyer J, 'Reflections on Some Theories of Punishment' [1968] vol. 59 Journal of Criminal Law, Criminology, and Police Science 595.

Ministry of Justice, *Monthly Population Bulletin* (2017).

Ministry of Justice, *Safety in Custody Statistics, England and Wales: Deaths in Prison Custody to December 2021, Assaults and Self-harm to September 2021* (2022).

Ministry of Justice, *Youth Justice Statistics 2018/19* (2020) 8.

Pheby C, *British police oppose positive discrimination for ethnic minorities* (YouGov 2020).
Warmington P, 'Critical race theory in England: impact and opposition' (2020) , 27(1) Identities 20.

What Does Society Hope to Achieve When it Punishes Offenders?

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The societal perspective on crime is that one who commits a crime must endure an institution for correction. However, one cannot collectively address all societies to say that they apply the same methodology for punishment, as each society differs in their methods. For some, punishment is not only a mechanism to punish but also deterrence. In China, this retributive approach is prevalent, as they view punishment as a natural deterrent in its own right[111]. Nevertheless, some societies have shifted away from retributivist punishment to a rehabilitative approach. To comprehend the modern perception of the punishment of crime, it is essential to understand the ideologies, historical context, and beliefs that society has had over time, to appreciate how they have reached their current understandings and practices. As such, this essay explores these understandings and practices utilised in a variety of different jurisdictions. Overall, society's main goal in punishing is to deter others from committing crimes to maintain social order.

Eastern Ideologies

Over time, Eastern Societies have showcased collective ideologies, reflecting shared understandings. This collective mindset, coupled with the historical cultures of Eastern countries, significantly influenced the contemporary retributivist and deterrent perspectives on punishment within Eastern Society. This is the case by virtue of old traditional methods of punishment, to which the ideas have been transmitted and shared through generations, thereby influencing modern approaches towards punishment.

Confucianism and Taoism are two ideologies that originated in China. Confucianism created a strong emphasis on the idea of social order and the proper conduct of individuals[112]. To ensure this idea is maintained within society, strict laws and harsh measures have been put in place. Additionally, Taoists believe in the idea of balance, harmony, and consequences for every action. This has translated to punishment which is proportional to the harm caused and

[111] Shanhe Jiang, Eric Lambert, Jin Wang, Toyoji Saito, and Rebecca Pilot 'Death penalty views in China, Japan and the US.: An Empirical Comparison' (2010) Journal of Criminal Justice 38 862.
[112] John Hill, 'Confucianism and the Art of Chinese Management' (2006) Journal of Asia Business Studies 1 2.

accountability for the actions of offenders. China, where capital punishment has long been a part of the system, holds the view that this form of retributive punishment serves as a natural deterrent, as the act of killing one deters one hundred.[113] This notion translates to present-day China, with Chinese high court officials saying, 'we sentence people to death ... to educate others – by killing one, we educate one hundred'[114].

Collectivism has played a part in the spread of these ideologies in the East. This has not only led to a similar mindset towards individuals but also towards methods of punishment. Members of Eastern societies prioritised the welfare of the collective over individual concerns, leading to a strong focus on maintaining social order. They would also adopt retributivist punishment methods to act as a natural deterrent against societal chaos. This was evident in Korea during the Joseon period, where practices such as caning, penal servitude, banishment, and execution were prevalent. These methods were based on the Great Ming code of Da Ming Lu from China's imperial dynasties.[115] Similarly, flogging, beating, imprisonment, banishment, and execution were found in Japan during the Heian period as a result of Chinese influence[116]. Both countries' approaches to punishment were shaped by ideologies originating in China. These methods of punishment have, however, become less brutal as time progresses. Regardless, the principles of retributivist punishment remain a contemporary method of deterrence, and have been accepted by society as a necessary method of punishment.

These practices throughout the history of Eastern societies have translated to the present, and society still views retributive punishment as the most appropriate way to punish and deter crime. Miethe and Lu[117] observed, that in China, societal order is upheld by the retributivist view of punishment, where punishment should mirror the degree of harm inflicted. Society considers retributive punishment as a reason to support capital punishment, rooted in philosophical and ideological principles based on philosophy and ideologies; it is seen as a

[113] Jiang, Lambert, Wang, Saito and Pilot (n 111).
[114] Hong Lu and Lening Zhang, 'Death Penalty in China: the Law and the Practice' (2005) Journal of Criminal Justice 33 367 368; Jiang, Lambert, Wang, Saito and Pilot (n 1) 864.
[115] Jae Woo Sim, 'The Penal System' (2014) Everyday Life in Joseon-Era Korea 218.
[116] Petra, Schmidt, (2002) 'Part A The History of Capital Punishment in Japan' in Capital Punishment in Japan 2.
[117] Terance Miethe and Hong Lu, Punishment: A Comparative Historical Perspective, (Cambridge University Press, 2005) 15.

means to alleviate the anger and pain brought by an aggressor's act within society[118]. As a result, the idea of harsh punishment also acts as a deterrent to society. In Chinese Society, capital punishment is viewed as having a natural deterrent effect,[119] and it is with this belief that support has been shown towards this retributive method of punishment.[120]

Japan serves as another illustration of the retributive punishment approach in Eastern societies. It retains capital punishment whilst still being endorsed by the constitution which is supported by both the public and the government.[121] Japanese society believes that the reason why the environment is safe and secure is because of the deterrence from social justice due to the retributive nature of punishment[122]. Many believe that a murderer cannot be put to rest unless the murderer is put to death.[123] Philosophies and collectivist ideologies have led to the uniform belief of methods of punishment within society, which has been passed down through history creating the same understanding of punishment.

Singapore is another example which has adopted a retributive approach and still practices capital punishment to this day. Lee Kuan Yew, the former Prime Minister and founding father explains Singapore's retributivist approach toward drug traffickers, indicating that 'One death is too kind for the hundreds of thousands of families who you will end up killing every day for years to come when their daughter or son is an addict'.[124] This was in reference to drug traffickers bringing kilos of drugs into Singapore. This sentiment is built upon the cultural views found throughout history which have stemmed from China, thus the approach taken towards traffickers is one that follows the 'eye-for-an-eye' dogma. Based on the late founding fathers'

[118] Jiang, Lambert, Wang, Saito and Pilot (n 1) 864; Shanhe Jiang, Eric Lambert, and Jin Wang, 'Captial Punishment Views in China and the United States' (2007) International Journal of Offender Therapy and Comparative Criminology 51 84 85.
[119] Jiang, Lambert, Wang, Saito and Pilot (n 1); John Hewitt, Adam Regoli, Robert Regoli, and Peter Iadicola, 'A Comparison of Death Penalty Opinion Among University Students in the United States and Taiwan' (2004) Crime and Criminal Justice International 3 73.
[120] Jiang, Lambert, Wang, Saito and Pilot (n 1) 864; [120] Jiang, Lambert, Wang (n 10); Shanhe Jiang, Eric Lambert, and Vincent Nathan, 'Reasons for Death Penalty Attitudes Among Chinese Citizens: Retributive or Instrumental?' (2009) Journal of Criminal Justice 37 225; Shanhe Jiang, and Jin Wang, 'Correlates of Support for Capital Punishment in China' (2008) International Criminal Justice Review 18 24.
[121] Jiang, Lambert, Wang, Saito and Pilot (n 1) 863.
[122] Schmidt, P. (n 116) 61.
[123] Charles Lane, 'On Death Row in Japan' (2005) Policy Review 132 69 71.
[124] MustShareNews, 'Lee Kuan Yew Explains Death Penalty for Drug Traffickers in Singapore.' (Youtube, 2021) < https://www.youtube.com/watch?v=-PXAOZwvv04 > (Accessed 16 February 2023).

ideologies, the present government has adopted this zero-tolerance approach to reject drugs in Singapore's community, while adopting a harsh approach to punishment[125].

Modern understanding and methods of punishment in Eastern societies are the result of shared history and common ideologies. This has led to similar methods of punishment, all guided by parallel lines of reasoning. Consequently, there is a unified perception of retributive punishment, aimed at making offenders pay for the damage caused. Society endorses this method of retributive punishment, seeing a direct causal link between its implementation and their safety, due to its deterrent effects. This shows that the retributive approach is successful in deterring crime and maintaining social order through harsh punishment.

Western Ideologies

In contrast, Western societies previously adopted a retributive approach to punishment but have since transitioned to rehabilitative methods. This is due to the greater focus on human rights, which influences modern-day philosophical debates. Individualistic thinking in Western societies have also played a part in the shift in societal views towards methods of punishment. Hence why old punishment traditions were replaced with modern ideologies. This achieves the goal of punishing, rehabilitating and reintegrating offenders into society.

In the past, Western societies also had a retributive view towards punishment, often overlooking the rights of offenders during the 18th century. In England, there was the existence of the 'Bloody Code' which applied capital punishment to a plethora of crimes[126]. Landau[127] asserts that the bloody code was implemented as a method to maintain social hierarchy and act as a method of deterrence. This is similar to methods of punishment found in Eastern societies. However, as discussed by Pollis and Schwab[128], there was a change in mindset and political stance to include a focus on human rights as found in England, France, and the US from the 17th to 20th centuries. This has significantly impacted society and has changed perceptions of punishment. .

[125] Victor Lye, 'Mr Victor Lye, Chairman of the National Council Against Drug Abuse (NCADA) at the Asia Pacific Forum Against Drugs (APFAD)', (Central Narcotics Bureau, 2015).
[126] Peter King, and Richard Ward, 'Rethinking the Bloody Code in Eighteenth-Century Britain: Capital Punishment at the Centre and on the Periphery' (2015) Past & Present 228 OUP 159.
[127] Norma Landau, *Law, Crime and English Society 1660–1830* (Cambridge University Press 2002) 4.
[128] Adamantia, Pollis and Peter Schwab, 'Human Rights: A Western Construct with Limited Applicability' (2006) Moral Issues in Global Perspective 60.

A significant influence on the view of Western society would be creation of uniform human rights laws by international bodies, especially those from the United Nations (UN). The Universal Declaration of Human Rights was one of the first documents to consider human rights on an international level[129]. Consequently, the UN's directions have been incorporated into specific jurisdictions, such as the European Convention on Human Rights. Additionally, publications such as the Human Rights and Prisons Manual by the Office of the United Nations High Commissioner for Human Rights[130] advocate for the better treatment of prisoners during their sentence in the forms of full rehabilitation and access to basic human rights. These developments have shifted the modern perception of punishment from a retributive approach to a rehabilitative one.

Norway exemplifies a country which has a strong focus on rehabilitation and reintegration of offenders back into society. Baer and Revneberg[131] observe that the Norwegian prison system is shifting to become more open, not only for inmates, but also for the public. This changes the perception of society towards prisons and prisoners as well as the added benefit of letting prisoners experience slow reintegration. The Norwegian prisons have been designed in a way where one can '... see no fences, gates or barbed wire, only cottages, green trees, lawns and the blue sea'[132]. This is important, as the setting of the prison plays a crucial role in the mental state of inmates helping with rehabilitation. Additionally, the Norwegian prisons provide up to tertiary education as well as skill development to help with reintegration[133].

In the United states, capital punishment is still utilised, but there is a changing focus on rehabilitation. The President has indicated that the US is gradually transitioning away from retributive punishment to a paradigm with a greater focus on rehabilitation and human rights[134]. It is also acknowledged, however, that there is the possible risk that rehabilitation does not have

[129] United Nations Office on Drugs and Crime, 'UNODC and the Promotion and Protection of Human Rights' (2012) 3.
[130] Office of the United Nations High Commissioner for Human Rights 'Human Rights and Prisons: Manual on Human Rights Training for Prison Officials.' (2005).
[131] Leonard D Baer and Bodil Ravneberg, B., 'The Outside and Inside in Norwegian and English Prisons' (2008) in Geografiska Annaler: Series B Human Geography 205.
[132] *ibid 21.*
[133] Christin Tønseth and Ragnhild Bergsland, 'Prison Education in Norway – the Importance for Work and Life After Release' (2019) Cogent Education 6 1.
[134] The Brookings, 'A Better Path Forward for Criminal Justice' (2021) Report by the Brookings-AEI Working Group on Criminal Justice Reform.

the desired effect due to the current system[135]. it is apparent that the rehabilitative process has not been adopted and developed completely. Consequently, the primary goal of allowing offenders to reintegrate into society may not be successful. The American Civil Liberties Union[136] conducted a survey and found that 91% of Americans say that the criminal justice system needs to be fixed. In the same poll, it was found that 71% of Americans find that incarceration is counter-productive to public safety[137]. This shows that not only is the government supporting rehabilitation, but society also sees that the current system is flawed and a desire for a change in approach.

The international agreements on improving human rights have led Western countries to shift their focus on punishment to correcting, re-educating and reintegrating offenders back into society. Some societies have advanced further ahead in this adoption of rehabilitative punishment in comparison to others. It has also been acknowledged that the retributive punishment methods of the past are ineffective in the present day, necessitating change. By re-educating and reintegrating offenders back to society, a second chance is offered, thus lowering recidivism. Therefore, the rehabilitative method aligns with society's goal to maintain social order by preventing future crimes.

Evaluating the Different Ideologies Underpinning Punishment

There are two contrasting views towards methods of punishment that have been discussed. Eastern societies still adopt the traditional retributive methods of punishment, while Western societies have shifted to a rehabilitative method of punishment. The eastern approach posits that harsh punishment, seeking retribution for the wrong committed not only helps society find a sense of justice but also sets an example to deter others from committing crimes. In contrast, the West, which used to have the retributive approach is slowly shifting away to an approach that focuses on rehabilitation through re-education, to assist with reintegration back into society. The goal of society is to maintain social order, and punishment is a mechanism that assists in doing so.

[135] *ibid.*
[136] American Civil Liberties Union, 91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds. (16 November 2017) <https://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds> (Accessed: 31 October 2023).
[137] *ibid.*

To achieve this goal, the retributive approach is far superior since the fear engendered by the punishment creates in society acts as a natural deterrent and steers a majority of society away from committing crimes. Additionally, for those who do commit crimes and enter a retributive system, when they are released after their sentence, they are likely to refrain from criminal behaviour, as they would fear experiencing the same punishment. As a result, offenders that are released would try to stay on the right path.

However, employing rehabilitative methods focus on re-educating offenders and fails to address the initial reduction of crime. Rehabilitative punishment does not have the same natural deterring effects as retributive punishment, since offenders would commit crimes, knowing that they would be incarcerated, but would be able to be re-educated and released back into society. Moreover, the prison population consists of offenders, sometimes of more serious crimes. Even though some offenders may go through re-education, there is no guarantee that it would be as effective, as daily interactions with other offenders could exert an influence. Therefore, for this method, there is still the issue of maintaining social order, as after being released, there is still the chance of reoffending.

Conclusion

Both methods of punishment are effective in their respective ways, however, a more appropriate method could be to change the current retributive punishment methods so they are not inhumane. History has shown that in both Eastern and Western societies, many harsh and inhumane practices in punishment have changed. Furthermore, US citizens recognized that the current system is flawed, and they feel that incarceration is counterproductive. This means that retributive punishment methods could work if the system is reformed. Therefore, to reduce crime and maintain social order, it is appropriate to improve the retributive punishment methods, as they are effective in deterring and punishing. Additionally, members of the society have reported that they feel safer as a result of the retributive punishment methods, even though they know they are harsh. Thus, the retributivist approach aligns with society's hope to maintain social order by deterring crime.

Bibliography

Adamantia, Pollis and Peter Schwab, 'Human Rights: A Western Construct with Limited Applicability' (2006) Moral Issues in Global Perspective 60.

American Civil Liberties Union, *91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds*. (16 November 2017) <https://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds> (Accessed: 31 October 2023).
Charles Lane, 'On Death Row in Japan' (2005) Policy Review 132 69.

Christin Tønseth and Ragnhild Bergsland, 'Prison Education in Norway – the Importance for Work and Life After Release' (2019) Cogent Education 6 1.

Green, D., *When Children Kill Children: Penal Populism and Political Culture*, (OUP 2012).

Hong Lu and Lening Zhang, 'Death Penalty in China: the Law and the Practice' (2005) Journal of Criminal Justice 33 367.

Jae Woo Sim, 'The Penal System' (2014) Everyday Life in Joseon-Era Korea 217.

John Hewitt, Adam Regoli, Robert Regoli, and Peter Iadicola, 'A Comparison of Death Penalty Opinion Among University Students in the United States and Taiwan' (2004) Crime and Criminal Justice International 3 73.

John Hill, 'Confucianism and the Art of Chinese Management' (2006) Journal of Asia Business Studies 1 1.

John, Pratt, *Penal Populism*, (Routledge 2007).

Leonard D Baer and Bodil Ravneberg, B., 'The Outside and Inside in Norwegian and English Prisons' (2008) in Geografiska Annaler: Series B Human Geography 205.

MustShareNews, 'Lee Kuan Yew Explains Death Penalty for Drug Traffickers in Singapore.' (YouTube, 2021) < https://www.youtube.com/watch?v=-PXAOZwvv04 > (Accessed 16 February 2023).

Norma Landau, *Law, Crime and English Society 1660–1830* (Cambridge University Press 2002).
Office of the United Nations High Commissioner for Human Rights 'Human Rights and Prisons: Manual on Human Rights Training for Prison Officials.' (2005).

Peter King, and Richard Ward, 'Rethinking the Bloody Code in Eighteenth-Century Britain: Capital Punishment at the Centre and on the Periphery' (2015) Past & Present 228 OUP 159.

Petra, Schmidt, (2002) 'Part A The History of Capital Punishment in Japan' in Capital Punishment in Japan 9.

Shanhe Jiang, Eric Lambert, and Jin Wang, 'Captial Punishment Views in China and the United States' (2007) International Journal of Offender Therapy and Comparative Criminology 51 84.

Shanhe Jiang, Eric Lambert, Jin Wang, Toyoji Saito, and Rebecca Pilot 'Death Penalty Views in China, Japan and the US.: An Empirical Comparison' (2010) Journal of Criminal Justice 38 862.

Shanhe Jiang, Eric Lambert, and Vincent Nathan, 'Reasons for Death Penalty Attitudes Among Chinese Citizens: Retributive or Instrumental?' (2009) Journal of Criminal Justice 37 225.

Shanhe Jiang, and Jin Wang, 'Correlates of Support for Capital Punishment in China' (2008) International Criminal Justice Review 18 24.

Terance Miethe and Hong Lu, *Punishment: A Comparative Historical Perspective*, (Cambridge University Press, 2005).

The Brookings, 'A Better Path Forward for Criminal Justice' (2021) Report by the Brookings-AEI Working Group on Criminal Justice Reform.

United Nations Office on Drugs and Crime, 'UNODC and the Promotion and Protection of Human Rights' (2012).

Victor Lye, 'Mr Victor Lye, Chairman of the National Council Against Drug Abuse (NCADA) at the Asia Pacific Forum Against Drugs (APFAD)', (Central Narcotics Bureau, 2015).

The Unprincipled Incoherency of the Law on Consent to Bodily Injury

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There is no succinct definition of consent in English law, thus resulting the jurisprudence and legislation within the subject area being wholly incoherent and unprincipled. To resolve this, there is a need for clear framework which is both unbiased to the morals of society and addresses issues where consent to bodily harm is not consensual and there is a high risk of permanent injury occurring.

The general rule regarding consent restricts its validity to actions which do not cause actual bodily harm is, as outlined in *Donovan*[138], thus permitting little scope for personal autonomy. This problem is demonstrated in *Brown*[139] wherein men engaged in sadistically sexual acts for their own pleasure were convicted with accounts of ABH and wounding under the Offences Against the Person Act 1861. In *Brown*[140] two principles were advanced: legal moralism, as the conduct was 'sufficiently immoral or degrading', and paternalism, that the law should be used to protect people from themselves. However, it is a clear example of a breach of these principles, as no permanent injury was inflicted, and homosexuality is now accepted within society, thus no longer being demonised or labelled a crime in the UK. Devlin argues in Enforcement of Morals (1965) 'the point to step in is if it threatens society'.[141] Thus, the rationale for consenting to bodily harm regarding legal moralism should focus explicitly on if it threatens society rather than whether it is immoral. This is supported by academics arguing the judgement in *Brown*[142] was too harsh, and the judges reached a decision not to protect the public from harm, but instead focused on promoting heterosexual relations whilst implying the immorality of homosexuality.[143] This contrasted with the conflicting decision in *Wilson,*[144] where his wife's consent to branding sufficed, signifying that consensual activity between spouses in the privacy of the home was not a matter for the courts.[145] The drastic difference in outcome

[138] R v Donovan [1934] 2 KB 498.
[139] R v Brown [1994] 1 AC 212.
[140] R v Brown [1994] 1 AC 212.
[141] Patrick Devlin, *The Enforcement of Morals* (OUP 1965).
[142] R v Brown [1994] 1 AC 212.
[143] Barbara Falsetto, 'Crossing the Line: Morality, Society, and the Criminal Law' (2009) CSLR 182.
[144] R v Wilson (1997) QB 47.
[145] R v Wilson (1997) QB 47.

between *Brown*[146] and *Wilson*[147] can only be attributed to prejudiced views against homosexuals. Therefore, the requirement of marriage should be immaterial to recognising personal autonomy and to allow the defence of consent. This rationale should apply equally to all cases of consensual activity resulting in no permanent injury.

The invasion of personal autonomy resulting from a Judges over emphasis on paternalistic views regarding consent to harm is reflected in the law, as body piercings and tattoos are common bodily modifications deemed to be legal.[148] To distinguish, 'extreme bodily modifications' has led to a charge of three counts of grievous bodily harm contrary to section 18 of the Offences Against the Person Act 1861.[149] This was a wholly unjust and unpredictable application of the law, as it should not interfere with the personal autonomy of an adult's consent to adjusting their own body. There should instead be a shift to the social disutility model, where there is clear legislation stipulating that unless the prosecution is able to articulate specific reasons for prohibiting the specific conduct, consent will be effective up to the level of grievous bodily harm.

Another issue pertinent regarding consent to bodily harm lies in the application of exceptions to the general rule, notably seen in cases of horseplay and body modifications such as branding, akin to tattoo, as seen in the *Wilson*[150] decision. Horseplay is a rough undisciplined play allowed as an exception, even though there is a risk of serious injury as per the *Aitken* decision.[151] The same rationale was applied to the *Jones*[152] decision wherein the young boys inflicting grievous bodily harm upon two schoolboys was quashed. However, in the case of *Burrell harmer,*[153] the young boy's consent was ineffective as they 'couldn't' understand the 'nature of the act'.[154] This conflicts with the decision of *Jones,*[155] where the boys could be seen to consent to nature of the act.[156] Further argued by L. Brosnan and Flyn: International journal of the law 2017, the judgement of individual's mental capacity is decided unfairly, which

[146] R v Brown [1994] 1 AC 212.
[147] R v Wilson (1997) QB 47.
[148] *ibid.*
[149] See also ***R v BM*** [2018] EWCA Crim 560.
[150] R v Wilson (1997) QB 47.
[151] R v Aitken [1992] 4 All ER 541.
[152] R v Jones [1987] Crim LR 123.
[153] Burrell v Harmer [1967] Crim LR 169.
[154] Burrell v Harmer [1967] Crim LR 169.
[155] R v Jones [1987] Crim LR 123.
[156] R v Jones [1987] Crim LR 123.

leads to unequal treatment within the law[157]. Thus, there is a crucial need for a clear framework of exceptions regarding capacity to consent in order to mitigate confusion and ensure that the public is aware of when they may become criminally liable for an act.

The contemporary limit on consent is far too restrictive, creating unjust and uncertain outcomes in criminal liability, as it is left to the interpretation of the act being a battery or an assault. This is demonstrated by the contrasting cases of *Slingsby*[158] and *Broadhurst*[159]. With respect to the former case, consent to battery was accepted as a full defence, whereas by contrast, the latter case held that inserting an object into a vagina is lawful battery, yet the defendant was still charged with manslaughter. These drastically different outcome make the law on consent to bodily harm incoherent. Though the law recognises this defence, a defendant still ended up facing a life sentence for manslaughter. This breaches the paternalistic view set by Hart, which argues the law should help prevent people from making mistakes they regret later, however, the law made this 'mistake' legal, but still punishable in certain circumstances making it unclear when their actions can be criminal. To rectify this issue, the law should broaden the limit on consent to actual bodily harm. The need for such reform is reflected in the dissenting judgements in *Brown,*[160] wherein it was argued the threshold should be set at grievous bodily harm. This should apply to all circumstances, since the scope of interpretation between actual bodily harm and assault or battery is too narrow and unclear.

Another principle issue concerns the implementation of section 71 Domestic Abuse Act 2021. This provision codified the decision in *Brown,*[161] providing that 'consent to serious harm for sexual gratification not a defence' and includes sections 18, 20, and 47 of the Offences Against the Person Act 1861. This is largely controversial and perpetuates the mistakes of *Brown*[162] interfering with the personal autonomy of couples to engage in BDSM sexual activities. Furthermore, it wrongfully labels people as domestic abusers when it is their way to express physical affection. Thus, it does not provide adequate protection to domestic abuse victims, making it easier to wrongly criminalise people where consent to bodily harm should be applicable. The Act should be revised to focus on domestic abuse where the intention is to

[157] Liz Brosnan and Ellinoir Flynn, 'Freedom to Negotiate: A Proposal Extricating 'Capacity' from' Consent" (2017) 13 *International Journal of Law in Context* 58.
[158] R v Slingsby [1995] Crim LR 570.
[159] R v Broadhurst 2019 [2019] EWCA Crim 2026.
[160] R v Brown [1994] 1 AC 212.
[161] R v Brown [1994] 1 AC 212
[162] R v Brown [1994] 1 AC 212

cause harm physically or mentally without consent and stop the unjust criminalisation of sexual activities.

Accordingly, the legal framework regarding consent to bodily harm requires the removal of outdated and biased moral-based decisions, and set a clear unbiased framework for when consent to bodily harm is accepted, whilst, at the same time, respecting individual autonomy.

Table of Authorities

Case Law

Burrell v Harmer [1967] Crim LR 169

R v Aitken [1992] 4 All ER 541

R v BM [2018] EWCA Crim 560

R v Brown [1994] 1 AC 212

R v Donovan [1934] 2 KB 498

R v Jones [1987] Crim LR 123

R v Slingsby [1995] Crim LR 570

R v Wilson (1997) QB 47

Secondary Sources

Brosnan Liz and Flynn E, 'Freedom to Negotiate: A Proposal Extricating 'Capacity' from' Consent'' (2017) 13 *International Journal of Law in Context* 58.

Devlin P, *The Enforcement of Morals* (OUP 1965)

Falsetto B, 'Crossing the Line: Morality, Society, and the Criminal Law' (2009) CSLR 182

Navigating the Legal Rink: The Case of Matt Petgrave and the Ambiguous Borders of Criminal Liability in Sports

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Introduction

News regarding ice hockey tends to remain within a North American vacuum. Updates regarding the sport do not garner the same share of global attention as the theatre of American politics or the spectacle of football. For this reason, it was shocking to hear my British flatmate comment on how tragic the death was of hockey player Adam Johnson. The death of Johnson of the Nottingham Panthers was a result of a cut to the neck he sustained after colliding with Matt Petgrave of the Sheffield Steelers, during a match on October 28, 2023. Following Johnson's death, controversy was sparked on social media as to whether there was any ill-intent behind the play. On November 14th, news broke that a man had been arrested on suspicion of manslaughter over the death of Johnson, and it is presumed to be Matt Petgrave[163].

With news of criminal charges being pursued, the ultimate question is prompted, what is the standard for criminal liability in the context of sport? With respect to the incident at hand, the manslaughter charge could fall into one of three categories: voluntary manslaughter, unlawful act manslaughter, or gross negligence manslaughter. Considering the relevant case law and list of potential charges, one could argue that Petgrave will not be found guilty of manslaughter.

The Incident

According to online videos, which have been regularly deleted and re-uploaded due to their graphic nature, the facts of the incident are as follows. Johnson skates along the sideboards of the ice rink while carrying the puck into the offensive zone, while simultaneously his teammate skates through the centre of the ice. As they enter the offensive zone, Johnson changes directions to cut to the inside of the ice, Petgrave (the defender) cuts across the blueline motioning to engage Johnson to make a defensive play. Instead, Petgrave collides with Johnson's teammate (Panthers player 1) just prior to making contact with Johnson, throwing Petgrave off balance and launching his leg into the air. At this point, Petgrave's skate blade

[163] Alex Smith, *Adam Johnson: Manslaughter Arrest Over Ice Hockey Player's Death* (14 November 2023) https://www.bbc.co.uk/news/uk-england-nottinghamshire-67419951 accessed 23 September 2023.

makes contact with Johnson's neck, causing a severe open gash. Johnson was rushed to the Northern General Hospital where he died as a result of his injury[164].

Potential Charges against Petgrave

The Crown Prosecution Service of England distinguishes between two different kinds of manslaughter: voluntary and involuntary.[165] Publicly, Petgrave has been charged with the general term of manslaughter, therefore both kinds should be considered to examine which he is more likely to face.

Voluntary Manslaughter

Voluntary manslaughter occurs where all the elements to prove murder exist, yet one of three partial defences applies, namely: diminished responsibility, loss of control, or a suicide pact[166]. Prior to the defendant arguing a partial defence, the prosecution must demonstrate the elements of murder: where a sane person unlawfully kills any human being under the King's Peace with intent to kill or cause grievous bodily harm[167].

It is difficult to make a persuasive argument as to Petgrave being charged with voluntary manslaughter. The prosecutor would have to prove beyond reasonable doubt that Petgrave did in fact intend to kill/cause grievous bodily harm to Johnson. Even if Petgrave's actions were intentional, it is improbable that he could cut Johnson in such a calculated manner given the accuracy required to make contact with Johnson's neck and the speed at which they were skating. Adding to this improbability is the contact Petgrave made with the opposing Nottingham Panthers player just prior to hitting Johnson. This, as Petgrave will likely argue, threw him off balance and caused the awkward fall involving the accidental raising of his leg. Lacking the intention necessary to convict Petgrave of voluntary manslaughter, the prosecution is likely to opt for one of the two distinctions contained within involuntary manslaughter.

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[164] Tanyka Rawden, *Coroner's Report to Prevent Future Deaths*, (1 November 2023) https://www.judiciary.uk/wp-content/uploads/2023/11/Adam-Johnson-Prevention-of-future-deaths-report-2023-0427_Published.pdf accessed 23 November 2023.
[165] Crown Prosecution Service, *Murder, manslaughter, infanticide and causing or allowing the death or serious injury or a child or vulnerable adult*, (5 October 2023) https://www.cps.gov.uk/legal-guidance/homicide-murder-manslaughter-infanticide-and-causing-or-allowing-death-or-serious accessed 23 November 2023.
[166] *ibid.*
[167] *ibid.*

Involuntary Manslaughter

Involuntary manslaughter is when an unlawful killing is committed without intention to kill or cause grievous bodily harm[168]. There are two kinds of involuntary manslaughter: unlawful act and gross negligence manslaughter. For unlawful act manslaughter the prosecution must prove that the defendant acted intentionally, the act was unlawful, and that all reasonable people would realise that the act would subject the victim to risk of harm[169]. Gross negligence manslaughter was described in *R v Rudling*[170] by Sir Levenson as, 'the breach of an existing duty of care which it is reasonably foreseeable gives rise to a serious and obvious risk of death and does, in fact, cause death in circumstances where, having regard to the risk of death, the conduct of the defendant was so bad in all the circumstances as to amount to a criminal act or omission'

Considering unlawful act manslaughter, the prosecution must prove that Petgrave intentionally raised his leg to make contact with Johnson. Additionally, the prosecution must disprove any defences Petgrave argues,[171] such as being thrown off balance by the Nottingham Panthers player prior to making contact with Johnson. It is difficult to imagine that prosecution can conclusively prove that either (i) Petgrave intended to hurt Johnson, so he made the necessary adjustments after hitting Panther's player 1 to raise his leg and cut Johnson; or (ii) in the split second following Petgrave hitting Panthers player 1, he decided he wanted to hurt Johnson, and so raised his leg in a fashion that would injure him. In the first case, Petgrave would have very little idea as to how his body would react following the bump he received from Panthers player 1. It would be very difficult for him to anticipate the right movement he needed to make in order to successfully injure Johnson. Therefore, it would appear that the prosecution's case would fail here as reasonable doubt arises regarding Petgrave's intention to hurt Johnson.

Finally, gross negligence manslaughter must be considered. This differs from the previous two as no intention needs to be proven, as merely the breach of an existing duty of care will suffice. This appears to be a better fit for the charge that is to be laid against Petgrave. In *R v Adomako*[172], Lord Mackay presents the test for gross negligence manslaughter in the following order: the defendant breaches a duty towards the victim who has died, whether the breach

[168] *ibid.*
[169] *ibid.*
[170] R. v Rudling (2016) EWCA Crim 741.
[171] Sir David Madison et al, 'The Crown Court Compendium', Judicial College.
[172] R. v Adomako [1994] 3 WLR 288 [187].

caused the death, and if the breach should be characterised as gross negligence. It seems plausible that the prosecution may phrase this duty in the context of hockey as the duty to exercise extreme care when a player's skates are in the air – owing to the dangers presented by the sharp edges of skate blades. As corroborated by the coroner,[173] it was the cut inflicted by Petgrave which caused Johnson's death. Petgrave's inaction to do everything in his power to avoid raising his skates to the level he did could amount to a breach of this duty in the form of a criminal omission. For these reasons, it is most likely that the prosecution will proceed with gross negligence manslaughter charges against Mr. Petgrave.

A Brief History of Criminal Proceedings resulting from Sports

To qualify the charges mentioned by the Crown Prosecution Service, it is important to consider how the courts have viewed criminal matters resulting from injuries sustained from playing sports. For clarity, the Johnson/Petgrave incident will be referred to as the Petgrave matter when making comparisons to principles described in case law.

In *R v Barnes*[174] it is mentioned that sports have their own disciplinary procedures and that moving matters beyond their governing bodies into the criminal courts is undesirable. Only in incidents where the conduct is sufficiently grave should criminal charges proceed. Petgrave's conduct could be seen as sufficiently grave, seeing as one may argue that he did intend to inflict damage upon Johnson. Therefore, on this basis, criminal action may proceed.

Barnes[175] goes on to reference *R v Brown*[176], a decision concerning individuals who consensually committed acts of violence against each other for sexual pleasure. While the facts are quite different from the matter of Petgrave, in Lord Mustill's analysis, he considers the presence of consent to injury in contact sports[177]. By an individual participating in contact sports, he understands deliberate contact may have unintended effects that can amount to grievous bodily harm. The individual does not agree to more serious injury that may be inflicted deliberately[178]. Applying this principle to the present matter, it is clear that Petgrave intended to make body

[173] Tanyka Rawden, *Coroner's Report to Prevent Future Deaths*, (1 November 2023) https://www.judiciary.uk/wp-content/uploads/2023/11/Adam-Johnson-Prevention-of-future-deaths-report-2023-0427_Published.pdf accessed 23 November 2023.
[174] R. v Barnes (Mark) [2004] EWCA Crim 3246 [5].
[175] *Ibid.*
[176] R. v Brown [1994] 1 AC 212.
[177] *Ibid* [266].
[178] *Ibid* [266].

contact in the play he initiated against Johnson, a legal part of hockey as defined in the International Ice Hockey Federation official rule book[179] which oversees the rules in the Elite Ice Hockey League. Petgrave's intended body contact resulted in the presumed unintended effect of cutting Johnson's neck. Petgrave's matter fits into what could be described as the implied assumption of risk principle that Lord Muskill presents[180]. Accordingly, this would provide a formidable defence to the likely charge of gross negligence manslaughter.

In *R v Cey*[181], the court was presented with another ice hockey incident where the issue of consent to the risk of injury was confronted. Justice Gerwing stated, "It is clear that in agreeing to play the game a hockey player consents to some forms of intentional bodily contact and to the risk of injury therefrom. Those forms sanctioned by the rules are the clearest example. Other forms, denounced by the rules but falling within the accepted standards by which the game is played, may also come within the scope of the consent." This statement echoes the sentiment of Lord Muskill that by nature of the sport requiring physical contact, and players being aware of this, they are consenting to the potential of injury.

The matter of Petgrave should be contrasted with the case of *R v Ciccarelli*[182], a matter resulting from an assault taking place during the course of a professional hockey game. Ciccarelli was a player for the Minnesota North Stars and Richardson for the Toronto Maple Leafs. Richardson crosschecked (forcefully hit another player with the shaft of his hockey stick) Ciccarelli just after the whistle had blown to stop play. Upon being cross checked , Ciccarelli turned around and hit Richardson over the head three times with his hockey stick. On appeal, Ciccarelli's conviction of assault was affirmed. Justice Corbett commented saying that Ciccarelli's actions went beyond the standard of implied consent – that striking an opponent over the head with a hockey stick was not something to be expected during the course of a hockey game[183]. Criminal liability was found in this case as there was clear intention on the part of Ciccarelli to retaliate against Richardson. Relating this back to Petgrave, the events that directly preceded the injury were to be expected as part of the game of hockey, therefore,

[179] IIHF Official Rule Book 2022/2023 https://blob.iihf.com/iihf-media/iihfmvc/media/downloads/rule%20book/220721_iihf_rulebook_v22.pdf .
[180] R. v Brown [1994] 1 AC 212 [266]
[181] R. v Cey, 1989 CanLII 283 (SK CA) 7
[182] R. v Ciccarelli, 1989 CanLII 7205 (ON SC)
[183] *Ibid* 127.

implied consent would exist. Regarding clear intention, where it was evident in *Ciccarelli*, it lacks in Petgrave, hence the more nuanced charge of manslaughter as compared to assault.

Considering, in sum, the charges against Mr. Petgrave and the case law surrounding consent to the potential of injury in contact sport, it is unlikely that he would be convicted of gross negligence manslaughter.

The Standard for Criminal Liability Regarding Sports

Where intent to injure is unclear and cannot definitively be proven, as with Petgrave, actions resulting in injury when committed in good faith according to the rules of the respective sport will likely fall within the 'implied assumption of risk' principle and no criminal liability will be found.

Where an intention can be argued and the action cannot be viewed as something that should be reasonably expected during the course of the sport, as in the case of *Ciccarelli*[184], criminal liability may be found. Caution should be undertaken when interpreting the criminality of actions that could reasonably/unreasonably be expected during sport. If conduct exceeds that expected within the bounds of the rules, it still may not reach the threshold level required for it to be criminal[185]. All circumstances must be considered, such as the violence of the act, if it occurred during play or after a stoppage, if it was an error in the heat of the moment[186], *inter alia*..., not merely looking at the action and determining that it is criminal because it is beyond the scope of the rules.

Conclusion

Precedent suggests that Matt Petgrave's likelihood of conviction for gross negligence manslaughter is low, considering the inherent risks in contact sports and the absence of clear intent to cause harm. The standard for criminal liability in sports is murky, requiring a balanced consideration of all relevant factors to avoid hastily labelling actions as criminal solely based on rule deviation. Similar to the global awareness of the tragedy of Adam Johnson's death – the

[184] R. v Ciccarelli, 1989 CanLII 7205 (ON SC).
[185] R. v Barnes [2004] EWCA Crim 3246 (as cited in Stefan Faniski, 'Consent and the Rules of the Game: The Interplay of Civil and Criminal Liability for Sporting Injuries' (2005) J. Crim. Law (423).
[186] *Ibid.*

result of Petgrave's charges will resound throughout common law jurisdictions, continuing to develop precedent regarding criminal liability in sport.

Table of Authorities

Cases

Canada

R. v Cey, 1989 CanLII 283 (SK CA)

R. v Ciccarelli, 1989 CanLII 7205 (ON SC)

United Kingdom

R. v Rudling (2016) EWCA Crim 741

R. v Adomako [1994] 3 W.L.R. 288

R. v Barnes (Mark) [2004] EWCA Crim 3246

R. v Brown [1994] 1 A.C. 212

Bibliography

Journals

Faniski S, 'Consent and the Rules of the Game: The Interplay of Civil and Criminal Liability for Sporting Injuries' (2005) J. Crim. Law (423)

Internet Sources

Alex Smith, *Adam Johnson: Manslaughter Arrest Over Ice Hockey Player's Death* (14 November 2023) https://www.bbc.co.uk/news/uk-england-nottinghamshire-67419951 accessed 23 September 2023

Tanyka Rawden, *Coroner's Report to Prevent Future Deaths*, (1 November 2023) https://www.judiciary.uk/wp-content/uploads/2023/11/Adam-Johnson-Prevention-of-future-deaths-report-2023-0427_Published.pdf accessed 23 November 2023

Crown Prosecution Service, *Murder, manslaughter, infanticide and causing or allowing the death or serious injury or a child or vulnerable adult*, (5 October 2023) https://www.cps.gov.uk/legal-guidance/homicide-murder-manslaughter-infanticide-and-causing-or-allowing-death-or-serious accessed 23 November 2023

David Madison, Simon Tonking, John Wait, David Ormerod 'The Crown Court Compendium', (June 2023) Judicial College https://www.judiciary.uk/wp-content/uploads/2023/06/Crown-Court-Compendium-Part-I.pdf

IIHF Official Rule Book 2022/2023 https://blob.iihf.com/iihf-media/iihfmvc/media/downloads/rule%20book/220721_iihf_rulebook_v22.pdf

From Admission to Employment: The Role of Law School Tiers in North American Legal Careers

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INTRODUCTION

The legal profession is one of the few careers which have seen a rapid increase in the past few decades. Canada has seen major growth in the number of lawyers which have raised from 16,130 lawyers in 1971 to 125,190 lawyers in 2014[187]. Given that the number of law schools in Canada only increased from 15 to 17 since 1978, this increase in lawyers has given rise to cut-throat competition in the law-school admission process[188]. This increase in what Erlanger calls an 'oversupply'[189] of lawyers has given rise to a ranking system of the law schools. In essence, this system is directly related to the level of prosperity and quality of education that is gained from attending a specific law school.[190] This can ultimately have a great impact on a lawyer's career. There is extensive quantitative research on major trends in the careers of lawyers, as well as the role of law school ranking on the career itself. The 'After the JD Study' of American lawyers' careers provides some relevant insights into the topic. Its Canadian counterpart, 'The LAB Study', provides similar insight into the legal careers of Canadian lawyers, however, there is significantly less research which focuses on an in-depth analysis of the careers of Canadian lawyers.

American law schools are divided into three tiers. The highest status tier which comprises the Top 14; middle status schools which are highly competitive; and the lower-status tier which comprises the open access public community colleges. These are highly stratified by various factors such as cost and resources, economic and racial background of the students, as well as the public or private status of the schools[191]. Nonetheless, the consequences of these status hierarchies can be severe. The stratification of law schools into different tiers can often lead to inequality in the professional fields as well as inequalities regarding income. In addition, these

[187] Ronit Dinovitzer and Meghan Dawe, 'Canada: Continuity and Change in a Modern Legal Profession' (2020) *Lawyers in 21st-Century Societies* 65.
[188] i*bid.*
[189] Howard Erlanger, 'Toward a Sociology of Law School Admissions' (1984) 34 *Journal of Legal Education* 374, 377.
[190]Michael Sauder and Ryon Lancaster, 'Do Rankings Matter? The Effects of U.S. News & World Report Rankings on the Admissions Process of Law Schools' (2006) 40 *Law & Society Review* 105.
[191] Scott Davies and David Zafira, 'The stratification of universities: Structural inequality in Canada and the United States'(2011) 20 *Research in Social Stratification and Mobility* 143.

status hierarchies lead to the homogenization of law schools where certain groups are concentrated in the student bodies of certain law schools. Similar status hierarchies exist in the realm of Canadian law schools as well,[192] though the hierarchies in question are far less pronounced in Canada in comparison to the United States, as there are over 200 ABA approved law schools functional in the United States while there are only 17 common law schools in Canada.

Structural factors–including , one's socio-economic status and their parents' educational attainment– play a crucial part in paving the path to both law schools and the careers that await the lawyers. These structural factors often exist in various stages of the legal career, such as in the admission process, articling positions, as well as the job opportunities available to an individual after the completion of law school. Similarly, law school rankings directly influence the settings in which law graduates work[193]. It is important to note that there is significantly less research on Canadian law schools and careers of lawyers in comparison to that in the United States. As a consequence, the effects of these pre-existing law school status hierarchies on the careers of Canadian lawyers is understudied. Keeping this in mind, the goal of this research paper is to extract knowledge from pre-existing research on the different tiers of law schools from both Canada and the United States in order to draw similarities, and ultimately make inferences in order to better understand the impacts of the law school tiers on the job prospects available to and the overall careers of Canadian lawyers. This paper will ultimately act as a literature review which analyses existing research to develop an understanding of the relationship between law school tiers and employment opportunities post-graduation. Therefore, by extrapolating from the research primarily on the United States, this paper argues that individuals who attend lower tier law schools in Canada tend to receive lower paying, less prestigious job opportunities in comparison to their counterparts who graduate from upper-tier law schools.

I. Canada v. the United States

Dinovitzer and Dawe's 2016 study of lawyers in Canada and the U.S. provides a good analysis of the major similarities and differences of the legal profession in the two countries. They utilise the *After the JD Study* and the *LAB Study* to do so. In their analysis, they find that the

[192] *ibid.*
[193] Ronit Dinovitzer and Bryant Garth, 'Lawyer Satisfaction in the Process of Structuring Legal Careers' 41 *Law & Society Review* 1.

legal profession is highly stratified in both the countries. However, it is important to note that there are important differences that stem from the variance in the national contexts. They find that the stratification of the profession is influenced by societal conditions, such as demographic inequalities, the size and power of government, as well as lawyer's career preferences[194]. Furthermore, the two countries share various similarities when exploring the stratification of the legal career. For example, the legal profession is stratified by sectors (private v. public sector) and settings (small/solo v. large firms)[195]. In addition, the reproduction of 'elite status' which is awarded to the graduates of the elite law schools who tend to be employed by large firms with well-paid positions. This group often disproportionately consists of white, upper-class individuals.

Even though there are some key similarities between the two countries, there are some major differences which dictate the stratification of lawyers in the two countries. For example, the notions of prestige and the appeal attached to the public sector vary significantly as Canadian lawyers who graduate with higher GPAs are more likely to work in the public field while US lawyers who graduate with higher GPAs are usually concentrated in large corporate firms[196]. In essence, the findings suggest that the public sector holds higher occupational prestige in Canada compared to the United States. Furthermore, even though the 'legal elite' exists in Canada as well, there are significant differences between the hierarchy of legal professionals as these hierarchies are far less pronounced in Canada[197]. As mentioned before, there is significantly less research on the legal careers and the implications of the stratification of the legal career in Canada compared to the United States. Nonetheless, the next section will analyze the broader systems that act as gatekeepers to the legal profession at different stages of the process. In doing so, relevant research available on lawyers' careers will be used as a tool to make inferences on the education and the careers of Canadian lawyers.

II. Social Factors that Impact the Entry into the Legal Career

Even though the legal careers of lawyers vary significantly between Canada and the US, quantitative studies on legal education as well as careers of lawyers point towards a recurring

[194] Ronit Dinovitzer and Meghan Dawe, 'Early Legal Careers in Comparative Context: Evidence from Canada and the United States' (2016) 23 *International Journal of the Legal Profession* 83.
[195] *ibid.*
[196] *ibid.*
[197] Dinovitzer, (n 193).

trend where there is a disproportionate distribution of lawyers. Various factors contribute to this disproportionality in the legal profession. A comparison between the 'After the JD Study' of American lawyers and the 'LAB Study' of Canadian lawyers sheds light on some of these factors that contribute to the disproportionality in the lawyers' careers. One of the major deciding factors is the socioeconomic background of the individual.

Parents' education and employment status dictates the tier of law school an individual attends. Dinovitzer and Garth find that individuals with parents who are least educated and have lowest occupational prestige attended fourth-tier law schools while fathers of students who attended the top tier law schools had the highest level of education and occupational prestige[198]. Erlanger argues that a huge chunk of lawyers were drawn from professional and managerial classes[199]. For example, fathers of over 55% of lawyers held professional or managerial jobs . Similar trends can be seen till date. For example, the LAB study[200] reports that approximately 63% of fathers held a bachelor's degree or higher, and 70% of the respondents' fathers hold or have held white-collar, professional or managerial jobs. This suggests that those who attend higher tier law schools, generally, belong to privileged socioeconomic backgrounds and have more access to high-paying jobs compared to those who attend lower-tier law schools.

Race also plays a significant role in predicting the education and employment outcomes of lawyers. The LAB study[201]finds that in contrast to 75% of white students, members of the racialised communities combined to make up only a quarter of students in top-tier law schools. This includes black respondents only constituting 5.8% of students, followed by 6.8% of South and Southeast Asian students and 7.5% of Asian students. In addition, they are more likely to work in the public sector while white lawyers are highly concentrated in private firms. In particular, Black lawyers are least likely to work in private firms, and are overrepresented in the public sector (p.7). These findings suggest huge discrepancies between an individuals' race and access to high-paying jobs.

III. Understanding the Broader Context

[198] Dinovitzer (n 193).
[199] Erlanger (n 189).
[200] Ronit Dinovitzer, 'Law and Beyond: A National Study of Canadian Law Graduates' *Social Science Research Network* 1, 8.
[201] *ibid.*

A. Law School Ranking System

Law school ranking refers to the "quantitative evaluative social measure"[202] of law schools which allegedly determines the quality of legal education provided by a school. Rankings often act as observable indicators of the underlying qualities of law schools when there is a lack of information and inability to measure the quality of the law school as an outsider. Even though rankings give a clear indication of these underlying qualities, they are not always accurate[203]. Rankings influence various trends in the application process such as the number of applicants, median GPA and LSAT scores, percentage of applicants accepted, and graduation rates of any given law school. In addition, these trends are strongly significant for the top tier schools that are ranked numerically rather than schools that are ranked by tiers[204]. Since this study is based on the US ranking system, this specific finding may raise concerns for the applicability of Canadian law school. This concern is valid as the U.S. has over 100 law schools whereas Canada only has 17 common law schools in the entire country[205]. Keeping the huge disparity in the number of law schools in the two countries, there are various law school ranking lists such as the US News & World Report, QRS global and many more in the US, while the only significant ranking list in Canada is the Mclean's ranking list. However, there is no single, comparable dominant ranking of Canadian law schools. Even though the ranking system is a new phenomenon and is less entrenched compared to the US[206], the structural inequalities that stem from this stratified system continues to increase in Canada[207].

B. Stratification of the Legal Profession

Stratification refers to the unequal distribution and control of valued "goods" such as for example, income, power, social status across individuals and groups according to social and economic hierarchies. Historically, advantaged groups have, and continue to enjoy a disproportionate share of these goods, often due to reasons unrelated to their personal effort or ability. Stratification is often generated through institutional processes such as resource

[202] Sauder (n 190).
[203] *ibid.*
[204] *ibid.*
[205] Dinovitzer (n 187).
[206] Meghan Dawe, 'Stratification in the Canadian Legal Profession: The Role of Social Capital and Social Isolation in Shaping Lawyers' Careers' (2018) *University of Toronto Department of Sociology*
[207] Davies (n 191).

accumulation, opportunity hoarding, marginalization, and domination which ultimately create and reinforce inequalities.

Law schools are highly stratified institutions which have pronounced status hierarchies which are codified through rankings. They are often categorized into the highest status tier (most competitive) middle status tier (moderately competitive) and lower status tier (open access institutions). They are stratified by factors such as cost and resources, economic and racial status of students, and private v. public sector. This stratification of law school can have severe consequences as these status hierarchies create and reproduce inequalities in income and professional field, can lead to the homogenization of law schools where advantaged groups are concentrated at the top-tier schools while the disadvantaged groups are restricted to middle and lower tier schools, and can place increased emphasis on rankings in the decision making process. Even though these hierarchies are far less pronounced in the Canadian education system, as it is almost entirely public compared to the private education system in the United states, it still reinforces inequality by limiting access to the resources for those who can afford it.

C. Social Closure and Impacts of Ranking on Earning

Ranking systems and status hierarchies often act as gatekeepers through social closure to limit the access while simultaneously creating homogeneity by controlling who gains entry into the legal profession in order to monopolize the provision of legal services to eliminate competition and maintain an inner circle of elite who have access to the profession[208]. Attempts at the monopolization of the legal profession are made at different stages, such as the education requirements, controlled accreditation by the ABA which privileges private, elite schools over public schools. As well as a significant increase in length, cost and admission requirements, all of which act as barriers for those in disadvantaged positions and denies them access while those who are predominantly white, upper-class gain full access to the profession, and thus creates social closure[209]. In other words, these status hierarchies reproduce inequalities between law schools[210] which further reinforce the status hierarchies and ultimately impact the careers of lawyers in the longer run.

[208] John Sutton, 'Law as a Profession' (2001) *Law/Society: Origins, Interactions and Change* 223-252.
[209] *ibid.*
[210] Wendy Espeland and Michael Sauder, 'Rankings and Reactivity: How Public Measures Recreate Social Worlds' (2007) 113 *American Journal of Sociology* 1.

Elite credentials associated with law school rankings translate into higher earnings for lawyers[211]. Law school rankings reinforce the stratification in law schools as they translate into the work settings of a law school graduate. For example, in the US, 53.3% of graduates from top 10 law schools work in firms with more than 251 employees compared to only 4% of graduates from tier-four law schools[212]. Similar trends can be seen in Canada as graduates of top-quarter law schools are most likely to be working in the largest law firms (20.7%), compared to 9.2% who graduated from fourth-quarter law schools[213]. These trends translate into the incomes of lawyers as large firms represent the highest starting incomes[214]. This relationship between law school ranking and income perpetuates the closed circle of elitism and status hierarchies as lawyers who attend elite law schools are concentrated in large firms which offer high salaries, however, predominantly white, upper-class individuals attend elite law schools, thus limiting access to upward social mobility for the disadvantaged groups.

RECOMMENDATIONS

By analysing the existing research on Canadian lawyers as well as extrapolating from research on US lawyers, this paper has shed light on the relationship between law school ranking and the overall careers of lawyers.

The first major issue is the systematic exclusion of disadvantaged groups and lack of access to the legal profession. As Sutton discusses, the education system is structured in a way that has monopolised the legal profession by limiting the access to it through various techniques such as stricter education requirements, controlled accreditation by the ABA which privileges private, elite schools over public schools, as well as a significant increase in length, cost and admission requirements, which act as barriers for those who cannot afford to go to law school[215]. Due to this, the legal profession is quite homogenous, with white people making up a significant portion of law students and lawyers. In order to make the legal profession more diverse and accessible, it is important to eradicate the monopoly that governs the access to the legal profession.

[211] Dawe (n20).
[212] Dinovitzer (n 193).
[213] Dinovitzer (n 200).
[214] Dinovitzer (n 194).
[215] Sutton (n 208).

The second major issue is the law school ranking system and status hierarchies which act as gatekeepers that play a significant role in predicting employment and income outcomes. As shown above, individuals who attend high-tier law schools are concentrated in high-paying, large corporate firms. However, a huge chunk of individuals who attend high-tier law schools are white, upper-class people who belong to privileged socioeconomic backgrounds. In addition, law school rankings, may be clear but not accurate indicators of the underlying qualities of law schools, the emphasis on these rankings needs to be minimized, if not completely disbanded[216]. Similarly, in order to ensure equal access to high-paying jobs, top-tier law schools should financially aid students who are deserving of it based on merit, regardless of their socioeconomic background.

Lastly, there is a dire need for more research into the education and careers of lawyers in Canada to truly understand the legal profession in Canada. Doing so would allow for a deeper analysis into the factors that influence access to legal education and the legal profession and to address the needs and concerns of the disadvantaged groups.

CONCLUSION

This article sought to explore the relationship between law school rankings and employment opportunities available to lawyers after graduation. A thorough analysis of pre-existing research from both Canada and the US led to the conclusion that lawyers who attend lower tier law schools tend to receive lower paying jobs compared to their counterparts who attend higher-tier law schools. The research shows that individuals who attend top-tier law schools are highly concentrated in high-paying private law firms, while those who attend lower-tier law schools are overrepresented in the public sector. Even though the majority of the research that inferences are drawn from are of US lawyers, we find some key similarities between the two countries which allow these findings to be generalized to Canada in a structured manner. This paper argues that various structures operationalize against disadvantaged groups to act as barriers which limit the access to legal education as well as the legal profession.

[216] Sauder (n 190).

Bibliography

Davies S and Zafira D, 'The stratification of universities: Structural inequality in Canada and the United States'(2011) 20 *Research in Social Stratification and Mobility* 143

Dawe M, 'Stratification in the Canadian Legal Profession: The Role of Social Capital and Social Isolation in Shaping Lawyers' Careers' (2018) *University of Toronto Department of Sociology*

Dinovitzer R and Dawe M, 'Canada: Continuity and Change in a Modern Legal Profession' (2020) *Lawyers in 21st-Century Societies* 65

Dinovitzer R and Dawe M, 'Early Legal Careers in Comparative Context: Evidence from Canada and the United States' (2016) 23 *International Journal of the Legal Profession* 83

Dinovitzer R and Garth B, 'Lawyer Satisfaction in the Process of Structuring Legal Careers' 41 *Law & Society Review* 1

Dinovitzer R, 'Law and Beyond: A National Study of Canadian Law Graduates' *Social Science Research Network* 1

Erlanger H, 'Toward a Sociology of Law School Admissions' (1984) 34 *Journal of Legal Education* 374

Espeland W and Sauder M, 'Rankings and Reactivity: How Public Measures Recreate Social Worlds' (2007) 113 *American Journal of Sociology* 1

Sauder M and Lancaster R, 'Do Rankings Matter? The Effects of U.S. News & World Report Rankings on the Admissions Process of Law Schools' (2006) 40 *Law & Society Review* 105

Sutton J, 'Law as a Profession' (2001) *Law/Society: Origins, Interactions and Change* 223

Assumption of Liability by Parent Corporations for Environmental Damage: An Analysis of the Vedanta Pathways

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It is generally acknowledged that the energy sector, specifically the oil and gas industry, is one of the largest hurdles to overcome in the fight against climate change.[217] While it will undoubtedly be generations until petroleum products are obsolete, there are increasing pressures on gas and oil industry giants to take precautions and initiatives to reduce their carbon footprint. As scientific advances have made it increasingly difficult to deny the existence of climate change and the impact it has on ecosystems as well as human health and infrastructure, there has been an increase in demand for corporate accountability. This has led to organisations across the globe taking legal action against industry giants in a variety of jurisdictions.

In September of 2023, the State of California sued Exxon Mobil, Shell, Chevron, Conoco Phillips, and BP alleging that they deceived the public by minimizing the risks fossil fuels posed.[218] Eli, an oil company domiciled in Italy, is currently facing the first climate lawsuit before the Italian courts, as environmental activists allege that greenwashing and lobbying have allowed for an increase in fossil fuel consumption despite the corporation knowing the risks.[219] In August of 2021, the Australian oil company, Santos, was sued by a group of shareholder activists over its claims to produce clean fuel and reach net zero emissions targets, alleging that there is no clear and credible plan, effectively greenwashing future plans.[220] This surge in environmental litigation has the potential to finally hold multi-billion dollar corporations accountable for the damage they have caused as a result of their operations. The fact that all these cases are rooted in providing misleading information to cast operations in a more favourable light demonstrates a critical link between environmental harm and corporate

[217] 'Global Methane Emissions and Mitigation Opportunities' (2020) Global Methane Initiative <https://www.globalmethane.org/documents/gmi-mitigation-factsheet.pdf> 20 November 2023
[218] Associated Press 'California sues oil companies claiming they downplayed the risk of fossil fuel' *The Guardian* (London 17 September 2023)
[219] Levantesi, Stella 'Italian oil firm Eni faces lawsuit alleging early knowledge of climate crisis' *The Guardian* (Rome 9 May 2023)
[220] Kurmelovs, Royce 'Santos sued for 'clean fuel' claims and net zero by 2040 target despite plans for fossil fuel expansion' *The Guardian* (Sydney 26 August 2021)

accountability. Plainly put, for too long petroleum companies have caused significant harm to the environment, and inadvertently, people are finally having to answer for their actions.

The United Kingdom is no exception to this global trend. A number of cases have recently come before the English courts relating to corporate responsibility associated with climate change and environmental damage. In theory, environmental litigations against major polluters are simple: Company X knew releasing Gas Y would cause Environmental Harm Z, breaching their duty of care and thus should have to pay damages. However, this type of tort negligence application is too simplistic to be applied in a corporate setting. Large companies, especially those in the petroleum industry, have developed a corporate web of smaller companies (subsidiaries) where the larger corporate entity (the parent company) controls its subsidiary and can subsequently delegate regional operations and specific duties to it. While it is a valid claim that this type of corporate structure serves certain logistical purposes, and certain jurisdictions may limit the scope of corporate entities that are not domiciled locally, it could potentially allow large corporations to escape liability under a variety of situations. Depending on the nature of the corporate structure, it is possible that parent companies will not be held liable for the actions of their subsidiaries. This protection is significant in the context of environmental litigation because very few civil suits are lodged as a matter of principle. The overwhelming majority of civil suits are filed in an effort to seek relief, which is typically in the form of damages (i.e. financial restitution) although in an environmental protection context, injunctions to stop certain activities may also be valid.

Two key cases have come before the English courts assessing the circumstances in which a parent company could be held vicariously liable for the actions of its subsidiaries. The cases of *Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents)* [2019] [221] and *Okpabi and others (Appellants) v Royal Dutch Shell Plc and another (Respondents)* [2021] [222] pertained to determining what if the parent company or the subsidiary should be held liable for the environmental damage caused by the subsidiary's operations. These cases should be alarming to climate activists because the court's rulings outlined ways in which a parent company could be held liable for the subsidiary's negligence. While it is not the court's place to take on an activist role and create policies with their rulings, the doctrine of precedent

[221] *Vedanta Resources PLC and another (Appellants) v Lungowe and others* (Respondents) [2019] UKSC 20.
[222] *Okpabi and others (Appellants) v Royal Dutch Shell Plc and another (Respondents)* [2021] UKSC 3.

nevertheless does create a form of law that is to be adhered to.[223] Effectively, the rulings in *Vedanta*[224] and *Okpabi*[225] have arguably shown parent companies what not to do to protect themselves from being held accountable for their subsidiaries' actions.

Through assessing the verdicts of *Vedanta*[226] and *Okpabi*,[227] this article intends to show how the court's vagueness in the verdict has constructed a circumstance where corporate entities can insulate themselves from liabilities associated with the harm their subsidiaries' negligence has caused. The central issue in both *Vedanta*[228] and *Okpabi*[229] revolve around whether or not large multinational resourced based corporations (the parent companies) should be held vicariously liable for the actions of smaller corporate entities. The smaller corporations in question (subsidiaries) were operating outside of the United Kingdom, where the parent company in both situations were domiciled. Having previously acknowledged the practical necessities associated with the parent company/subsidiary dynamic, it is worth noting that this corporate structure is not inherently sinister, nor is it by its nature a threat to carbon neutrality initiatives. However, it stands to reason that with the right corporate structure and policies put into place, parent companies could insulate themselves from liability for their subsidiaries actions. This would effectively allow the parent company to protect itself (and its deep pockets) by essentially scapegoating the subsidiary.

In *Vedanta*[230], the issue before the Supreme Court of the United Kingdom (the UKSC) related to which corporate entity should bear the legal responsibility for alleged toxic emissions from the Nchanga Copper Mine ('the mine') in Zambia. These emissions allegedly rendered the local water supply unsuitable for drinking or crop irrigation, as well as causing health problems for the local residents.[231] The mine was owned by Konkola Copper Mines plc ('Konkola') a Zambian corporation, which is a subsidiary of Vedanta Resources PLC ('Vedanta'), which is

[223] 'doctrine of precedent' (*Lexis Nexis Online*) <https://www.lexisnexis.co.uk/legal/glossary/doctrine-of-precedent#:~:text=What%20does%20Doctrine%20of%20precedent,cases%20with%20materially%20similar%20facts> accessed 22 November 2023.
[224] *Vedanta* (n 221).
[225] *Okpabi* (n 222).
[226] *Vedanta* (n 221).
[227] *Okpabi* (n 222.
[228] *Vedanta* (n 221).
[229] *Okpabi* (n 222).
[230] *Vedanta* (n 221).
[231] *ibid* [2].

domiciled in the United Kingdom.[232] Both Vedanta and Konkola challenged the jurisdiction of the negligence torts filed against them on the basis that the claimants were a group of Zambian citizens who resided in the Chingola District near the mine, and therefore should not be tried in English courts.[233]

While four issues were brought before the UKSC to determine how exactly the allegations against Konkola and Vedanta should be tried, only one issue specifically addressed how the corporate structuring would impact the case. The other three issues related to a potential violation of the Brussels Regulation (a European Union law that addressed how member states were to address civil and commercial disputes with international elements), whether or not the English courts were the proper place to bring the claim, and if hearing the issue in Zambian could potentially deny a substantial level of justice being served.[234]

The issue central to corporate structuring and negligence liability asked what level of managerial involvement by Vedanta would meet the threshold for assuming responsibility for Konkola's actions.[235] While it was not the UKSC's duty to determine what that threshold was - ruling that answering that question should be interpreted in the context of Zambian law[236] - it held that there were four distinct pathways in which such a responsibility could be established. These became known as the 'Vedanta Pathways.' The first is if the parent company directly manages, or assumes some sort of joint management of the subsidiarity.[237] The second pathway is whether the parent corporation provided defective advice or defective policies that were implemented by the subsidiary.[238] If the parent company were to provide such advice or policies, then they would be responsible for the subsidiary acting on that information. The third pathway would involve an analysis of how the parent company promoted its policies through the corporate structure and what steps were taken to ensure such initiatives were implemented by their subsidiarity.[239] The court specified that this criteria was to be applied to safety and environmental policies,[240] although it could arguably be applied to other policies that could have

[232] *Vedanta* (n 221) [2].
[233] *ibid* [4].
[234] *ibid.*
[235] *ibid* [44].
[236] *Vedanta* (n 221) [44].
[237] *ibid* [26].
[238] *ibid.*
[239] *ibid* [26].
[240] *ibid.*

implications for a duty of care, such as confidentiality. The fourth pathway is that if the parent company "exercises a particular degree of supervision and control of [the subsidiary]."[241] This phrasing implies that a lack of supervision, or perhaps a minimal amount of oversight, could lead to the conclusion that the parent company was unaware of their subsidiary's actions, and therefore not liable for their activities.

It is important to note that in *Vedanta,*[242] the UKSC did not make an absolute decision if Vedanta should be held responsible for any of Konkola's negligence. The question before the court was if a certain level of managerial involvement by Vedanta in Konkola's operations would warrant Vedanta being responsible for Konkola's negligence.[243] The UKSC, in outlying there were ways in which such assumption of responsibility could be assumed, but did not prescribe what amount of control and management would be enough to create that liability. This is corroborated by the UKSC's acknowledgement that while there was also a question of how involved Vedanta was in Konkola's management, it was not what the court was tasked in determining. The UKSC merely outlined that the claimants brought a credible enough argument to court to warrant further dissection of the corporate structure to determine if Vedanta should be held responsible for Konkola's negligence.[244] The UKSC was however, very firm in the judgement that the liability of a parent company in response to their subsidiaries actions is not a distinct category of negligence.[245]

Almost immediately following *Vedanta*[246]*, Okpabi*[247] made its way to the Supreme Court. The material facts of the case pertained to a group of Nigerian citizens who inhabited an area that was allegedly polluted by oil pipelines and other associated infrastructure by the Shell Petroleum Development Company of Nigeria Limited (SPDC).[248] As the name suggests, SPDC is a subsidiary of Shell plc, which existed in order to undertake petroleum operations in the Niger Delta region.[249] The appellants brought a negligence claim against both Shell and SPDC on the basis that Shell owed a duty of care to the appellants, because they exercised a significant

[241] *ibid* [26].
[242] *Vedanta* (n 221) .
[243] *ibid* [44].
[244] *ibid.*
[245] *ibid* [49] [50] [51] [54].
[246] *Vedanta* (n 221).
[247] *Okpabi* (n 222).
[248] *Okpabi* (n 222) [4].
[249] *ibid.*

amount of control over SPDC's operations as well as assumed responsibility for their operations.[250]

There were two major questions before the UKSC in *Okpabi*[251], the first was if the Court of Appeal made an error in its judgement by miscalculating how much weight should be given to the evidence presented and the judgement awarded was based on that assessment. The second issue before the court was whether or not the Court of Appeal had erred in determining that there was no real issue to be tried with respect to Shell's vertical corporate structure. Shell's internal hierarchy allowed for the delegation of various responsibilities - including environmental responsibility and operational safety - to their subsidiaries, and the UKSC held that analyzing that structure was indeed a triable matter. Essentially, during the trial at the Court of Appeal, various Shell witnesses were not cross-examined and certain pieces of evidence that offered insight to how the corporate structure was created and controlled were not properly weighed.[252]

Like *Vedanta*,[253] the matter before the court was a threshold question; the UKSC was not convened to make a definitive ruling on whether or not certain actions constituted negligence and who should be liable for them.[254] In spite of this, an important legal milestone was reached in that the court did emphasize that there is no special test to determine if parent companies owe a duty of care to those affected by negligent actions of their subsidiaries.[255]

In its ruling the UKSC reaffirmed also drew attention that assessing the dynamic between parent companies and their subsidiaries, that it would be inappropriate to "to shoehorn all cases of the parent's liability into specific categories."[256] Plainly put, each circumstance should be independently assessed, using the Vedanta pathways to determine exactly how much control the parent company had over its subsidiary, which would ultimately determine whether or not a duty of care by the parent company could be established, and a form of vicarious liability was committed.

[250] *Ibid* [10].
[251] *Okpabi* (n 222).
[252] *Okpabi* (n 222) [120-125].
[253] *Vedanta* (n 221).
[254] *Okpabi* (n 222) [149-151].
[255] *ibid* [27]
[256] *ibid* [27].

This is without question the correct approach to determining corporate liability. To impose an automatic responsibility on parent companies for the actions of their subsidiaries is unjust, particularly as there are a number of holding companies that would generally be regarded as having an investor type role as opposed to a managerial role. However, it would also be inappropriate to completely sever the link of liability between parent and subsidiary, as many multinational companies have policies and procedures that are harmonized through their entire corporate structure.

However, the Vedanta pathways are arguably too vague, and therefore vulnerable to exploitation by corporate entities keen to shield themselves from any responsibility for other subsidiaries' actions. The Vedanta pathway dictates that a duty of care could be owed by the parent company on behalf of the subsidiary (arguably a form of vicarious liability) if the parent took over management or assumed some sort of joint management of the subsidiary.[257] The specific language used in Okapi is "[Shell] taking over the management or joint management of the relevant activity of SPDC"[258] would result in a duty of care being voluntarily assumed. Specifically in *Vedanta*[259] Lord Briggs acknowledged that this dynamic is somewhat open to interpretation as it "depends on the extent to which, and the way in which, the parent avails itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary."[260] While this may not be clarified without further litigation, Lord Briggs' statements suggest that if the parent company's involvement was requested (as opposed to intervening), this technicality could form the basis of a claim that no duty of care was owed because their actions were done at the request of the subsidiary, thus justifying their retention any and all liability ensuing.

The second Vedanta pathway outlines that if the parent company provided bad advice or unsuitable policies which were then implemented by the subsidiary, the parent company could be held liable for the subsidiary's negligence.[261] This is particularly relevant in the context of climate litigation because the court specifically addressed environmental concerns in its statement: had "[Shell] provid[ed] defective advice and/or promulgat[ed] defective group wide

[257] *Okpabi* (n 222) [26].
[258] *ibid.*
[259] *Vedanta* (n 221).
[260] *ibid* [49].
[261] *Okapi* (n 222) [26].

safety/environmental policies which were implemented as of course by SPDC."[262] An optimist would like to hope that this pathway never needs to be invoked in a court of law. One would hope that in all situations, every parent company is always providing sound responsible advice that prioritized environmental conservation. However, this could be the easiest path to establishing a duty of care owed by the parent company - all one would have to do is prove the advice defective. With scientific advances making it virtually impossible to deny the existence of climate change and detrimental impact on natural ecosystems, proving the advice or policies to be defective could be a relatively simple feat. However, in order to determine if that meets the necessary threshold, an appropriate case needs to come before the court.

The Third Vedanta pathway is that if the parent company were to adopt a broad policy throughout their entire corporate structure and ensure it was being implemented, the parent company would then assume a duty of care on behalf of the subsidiary. This is particularly relevant to the issues surrounding climate change because in *Okapi*[263], the UKSC referred to a duty of care being created with regards to "group wide safety/environmental policies and taking active steps to ensure their implementation."[264] This particular statement creates some potentially dangerous flexibility for parent corporations. In theory, a duty of care by the parent company on behalf of their subsidiary could be circumnavigated by having these policies (as are often a legal requirement) but then not taking the steps to implement them amongst their subsidiaries. While failure to follow through on established policies would most likely result in a form of actionable damage on a tort claim, this could be more subject to the laws and legal tests of the national courts in which the subsidiary company is domiciled. In *Okapi,*[265] the UKSC did determine that determining the suitable level of managerial involvement was a matter for the Zambian courts.[266] This creates a situation in which parent companies take on a level of involvement that would not construe an assumption of liability in foreign courts, potentially exploiting looser regulations and lower levels of corporate accountability abroad, as can be the case in developing nations.

The fourth Vedanta pathway outlines that a duty of care by the parent company on behalf of the subsidiary could be construed if the parent company "exercises a particular degree of

[262] *Okapi* (n 222) [26(2)].
[263] *ibid.*
[264] *ibid* [26(3)].
[265] *Okpabi* (n 222).
[266] *ibid* [44].

supervision and control of [the subsidiary]."[267] However, there is no additional insight as to what that particular degree of supervision and control should be. While admittedly it was not for the UKSC to define what "a particular degree of control" is, it stands to reason that a parent company could absolve itself of any liability if they could convincingly argue that they did not have that "particular degree of control." While it is reasonable to expect that the "particular degree of control" may be influenced by the norms and nature of the industry they are in, the fact that the UKSC has offered no insight whatsoever as to how these control mechanisms are to be assessed should be concerning. Future litigation could potentially see a circumstance where a parent company effectively argues that they did not meet this "particular degree of control" and could corroborate this claim through cleverly drafted company protocols. It would also be curious to see how the courts would interpret a situation where a parent company merely had an illusion of control, and if that illusion of control and the ensuing compliance would be sufficient to actually be a degree of control.

While there are certain risks associated with a parent company loosening control and oversight over its subsidiaries, avoiding a potentially massive financial payout could arguably be in a corporation's best interests and therefore worth risking a potential loss of corporate control. Ultimately, more cases will need to come before the English courts in order to determine exactly how much management will warrant an assumption of a duty of care by a parent corporation. Failing that, one has to hope that increased public demand will create enough political pressure to force Parliament to implement the necessary statutory provisions, creating a much more substantive system of environmental protection and corporate accountability.

[267] *ibid* [26]

Table of Authorities

Cases

Okpabi and others (Appellants) v Royal Dutch Shell Plc and another (Respondents) [2021] UKSC 3

Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents) [2019] UKSC 20

Legal Dictionaries

'doctrine of precedent' (*Lexis Nexis Online*) <https://www.lexisnexis.co.uk/legal/glossary/doctrine-of-precedent#:~:text=What%20does%20Doctrine%20of%20precedent,cases%20with%20materially%20similar%20facts> accessed 22 November 2023

'philosophy, n' (*OED Online*, OUP June 2013) <www.oed.com/view/Entry/142505> accessed 21 August 2013.

News Articles

Associated Press 'California sues oil companies claiming they downplayed the risk of fossil fuel' *The Guardian* (London 17 September 2023)

Kurmelovs, Royce 'Santos sued for 'clean fuel' claims and net zero by 2040 target despite plans for fossil fuel expansion' *The Guardian* (Sydney 26 August 2021)

Levantesi, Stella 'Italian oil firm Eni faces lawsuit alleging early knowledge of climate crisis' *The Guardian* (Rome 9 May 2023)

Reports

'Global Methane Emissions and Mitigation Opportunities' (2020) Global Methane Initiative <https://www.globalmethane.org/documents/gmi-mitigation-factsheet.pdf> 20 November 2023

Colonisation in Canada: The Impact of the Indian Act on Indigenous Femininity

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Prior to colonisation, Indigenous women were regarded as sacred and were highly respected in their societies. Indigenous communities were structured with far more complexity than a clear distribution of responsibilities among its members. Often there was much flexibility in the specific work which needed to be completed and would sometimes be assigned based on whomst was available at the time, resulting in an overlap in the workforce between men and women.[268] Contemporary Indigenous women have become one of the most vulnerable and discriminated members of Canadian society today. The progression of The Indian Act 1876 over time will be explored to determine how it has affected Indigenous women and how they exist within their culture.

The Indian Act 1876:

The purpose of colonisation was to assimilate Indigenous people into a more Europeanised culture. Looking at the status and power of women prior to colonisation, they had more rights and stature than European women of the time. It is worthwhile to note that The Indian Act 1876 evolved overtime to cater to Indigenous societies, thus amending several parts to ensure it did not pass on discriminatory results, such as in Bill C-31[269]. The language used within The Indian Act 1876, as well as the later provisions in The Indian Act 1985, contain language that deliberately excludes women. One of the major faulty establishments in The Indian Act 1876 was a definition of what constitutes an Indian. This was to be used to determine who, under the Act, was eligible to receive rights under the legislation. An important aspect to highlight regarding the definition of 'Indian' is that status was assigned to Indigenous men, resulting in the status of women and children relying on that of the father.[270] This simple use of language had a multi-generational impact on the lives of countless women.

Because women did not have Indian status of their own, it left them at the mercy of men, both socially and financially. Normally this should be a mere trivial fact, but for the Indigenous

[268] Kim Anderson and Maria Campbell, *Life Stages and Native Women: Memory, Teachings, and Story Medicine* (Winnipeg: University of Manitoba Press, 2011).
[269] The Indian Act 1876.
[270] *Ibid.*

people of Canada, this distinction of status Indian versus non-status Indian is vital. The Indian Act 1876 dictates many rights and protections that the government is obligated to provide to any person who is considered Indian. This makes it vital to the very survival of every Indigenous person to be identified as Indian, so that they are given everything the government has promised them. To not be considered Indian means losing rights not only to their traditional lands but also losing a part of their very identity. Lastly, where there is reference to what Indians are entitled to under The Indian Act 1876, there is a consistent use of male pronouns, thus further excluding Indigenous women.

Legislation has played a major role in the degradation of Indigenous womens' role in their own societies. The Indian Act 1876 gave certain Indigenous men status and made them the sole determinants of status.[271] As a result of this, women's rights and their eligibility for status became reliant on their sustaining relationships with men, effectively stripping them of their individual rights and hierarchical respect they had once enjoyed within their communities, and leaving a clear void of co-dependence wherein Indigenous women were forced to rely on men. This system of giving Indigenous people status was a mechanism the government used to maintain their power over the Indigenous population of Canada. They conferred upon themselves the power to decide who qualified as 'Indian', ensuring that only this group would receive the full entitlements stipulated in the treaties.

Indigenous Women's Stature Prior To Colonisation

In traditional Indigenous societies, women were treated with far more respect and dignity than European women were historically treated. When it came to domestic work in Indigenous societies, it was not looked down upon or devalued the way in which it was in European society, and, in fact, the work of women was seen as a part of a system which ensured balanced prosperity for the community.[272] Traditionally, when women would enter into adulthood, the roles and duties expected of each member of society became more gendered and the young women would be expected to learn how to maintain the well-being of the community.[273] The scope of the duties of an Indigenous woman in her community was far more expansive than what was the norm for European society at the time.

[271] *Ibid.*
[272] Kim Anderson and Maria Campbell, *Life Stages and Native Women: Memory, Teachings, and Story Medicine* (Winnipeg: University of Manitoba Press, 2011).
[273] *Ibid.*

An example to look at are the women of Nadouek. Traditionally, Nadouek women were heavily involved in every aspect of war, from making the weapons, selecting representatives for war councils, preparing the men for battle, to deciding whether to go to war and indeed having the final say. They would determine a warrior's eligibility for war by engaging in a pre-battle ritual called the 'fort fight' ritual.[274] Women were also in charge of deciding what would happen to any prisoners of war. The Nadouek people illustrate the respect and power that Indigenous women enjoyed in their traditional societies, as by contrast, there is nowhere in European history where women ever had an active and powerful role in politics or warfare to the extent that the Nadouek women did in their societies.

Furthermore, in traditional Nadouek society, women were involved in politics. Their counsel and advice was not only valued but often sought out. To understand why this was the case, we must understand that their traditional society was, as many Indigenous societies were, both matriarchal and matrilineal, which contradicts European society which is patriarchal and patrilineal. [275] A reason for this could be because men had a higher mortality rate due to their role in warfare so tracing the lineage through the woman would have been a much better method because it was more stable. This was because there was a higher chance that women would outlive men, thus making their kinship network much easier to manage and lineage easier to trace. Lastly, their overall belief system of honouring women in their role as providers of life may have also contributed to this matriarchal and matrilineal society. [276]
One final point worth examining is the word used for women in the Cree language, which is '*iskwew',* which originates from '*iskwuptew',* signifying the fire that burns inside the tipi.[277] Having women being named after the fire showcases the valued and sacred role of women. The tipi is sacred because it is the traditional shelter of the Indigenous people. It provided safety and security and the fire that burned within it provided warmth in the cold and sustained the community since it cooked their food, much like women did in Indigenous societies.[278] Women provided for the community the same as the fire of the tipi, and as such were given the

[274] Magee K, 'They Are the Life of the Nation: Women and War in Traditional Nadouek Society' (2008) 28 CJNS 119.
[275] *Ibid.*
[276] Arden Ogg, *Cree Literacy Network*, (April 19th, 2013) <https://creeliteracy.org/2013/04/19/iskwewak-women/#:~:text=The%20keeper%20of%20the%20lodge,the%20Cree%20word%20for%20heart.> accessed November 24th, 2023.
[277] *Ibid.*
[278] *Ibid.*

same respect and held in such high regard in society since they were named after something that was so vital to their very survival. [279]

The honour and respect which Indigenous women held prior to colonisation sustained a severe attack by the Canadian colonial powers through their assimilative and violent methods of colonialism. We have looked at a traditional Indigenous society and how sacred and respected women were in often holding important roles in society beyond that of food production and childrearing. Indigenous women were not merely passive observers of history but were in fact very active and often played major roles in key historical moments. Consequently, when we look at contemporary Indigenous women, we are seeing that they are no longer in this position.

Reserve Land Ownership

With respect to the possession of lands on a reserve, section 20(1) of The Indian Act 1985 states that 'No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band'.[280] The amended Indian Act 1985 is gender biased and only mentions 'him' when owning reserve land as mentioned above. Further, section 20(2) of The Indian Act 1985 indicates 'Certificate of Possession: states that the Minister may issue to an Indian who is lawfully in possession of land in a reserve a certificate, to be called a Certificate of Possession, as evidence of his right to possession of the land described there in'.[281] There was an amendment in 2017, Bill S-3 called the Gender Equity in Indian Registration Act[282], which sought to eliminate sex-based inequalities within The Indian Act 1876. It wasn't until 2019 that there was an active effort made to jettison all gendered language within the legislation of The Indian Act 1985. This was in response to the decision of the Superior Court of Quebec in *Descheneaux v. Canada*[283] which prompted the Canadian government to create Bill S-3. In the case of *Descheneaux v. Canada*,[284] the courts held that the language of certain sections presented in The Indian Act 1985 violated section 15 of the Canadian Charter of Rights and Freedoms.

Marriage and Status:

[279] *Ibid.*
[280] The Indian Act 1985.
[281] *Ibid.*
[282] Bill S-3, Gender Equity in Indian Registration Act 2017
[283] *Descheneaux v. Canada*, 2015 QCCS 3555
[284] *Ibid.*

Since the establishment of The Indian Act 1876, no significant changes were made until The Indian Act 1951 was passed which removed the red ticket legislation and the introduction of section 12 (1) B which introduced the 'double mother clause'[285]. The red ticket legislation was set up to safeguard a woman if she lost her husband. When she became a widow, she would lose her status, but she would be given a red ticket which would allow her to remain on the reserve. The double mother clause was a provision that would disqualify women from being able to pass on status to their grandchildren if they had acquired their status through marriage.[286] It is important to note that in 2019 with the passing of Bill C-3 as an amendment to The Indian Act 1985, the double mother clause was eliminated.[287]

According to The Indian Act 1876, the definition of an Indian was 'any male person of Indian blood reputed to belong to a particular band; secondly, any child of such a person; Thirdly, any woman who is lawfully married to such a person'.[288] This wording is key because it systematically took all power away from women in explicitly acknowledging Indigenous men and largely ignored women. This is a clever way for the government to reduce the amount of people that they had obligations towards, and strategically impose their patriarchal and patrilineal ideology onto Indigenous people. This discriminatory system was instrumental in the degradation of women's status in society. It took the power and respect that women once held in society and eradicated it, putting them under the thumb of men. As a result, men retained their status in any event and were not punished for choosing to marry someone who did not have status. This essentially meant that men were free to marry whomever they chose because their status did not rely on anyone else's.

Women, on the other hand, did not enjoy the same luxury. For women, their status was reliant on the man, either their father or their husband. Marrying a man without status meant that they

[285] Linc Kesler, Karmen Crey, Erin Hanson, 'Bill C-31' (2009) <https://indigenousfoundations.arts.ubc.ca/the_indian_act/#whitepaper>accessed November 24th, 2023.
[286] The Indian Act 1951, 'Eighth Annual (2022) Statutory Report Pursuant to Section 2 of the Indian Act Amendment and Replacement Act, Statutes of Canada, Chapter 38, 2014' March 10th, 2022 < https://www.sac-isc.gc.ca/eng/1643829194000/1643829226673> accessed November 24th, 2023.
[287] Gender Equity in Indian Registration Act (Bill C-3), 'Gender Equity in Indian Registration Act (Bill C-3) Comes Into Force January 31, 2011 <https://www.canada.ca/en/news/archive/2011/01/gender-equity-indian-registration-act-bill-c-3-comes-into-force-january-31-2011.html> accessed November 24th, 2023.
[288] Mary-Ellen Kelm and Keith D. Smith. *Talking Back to the Indian Act: Critical Readings in Settler Colonial Histories* (University of Toronto Press, 2018).

would lose status permanently, and their children would also be denied status as well.[289] Even if women were widowed or divorced, they were unable to regain their status.[290] Furthermore, the kind of status is dependent on the band of the man. For example, if a status Cree woman, who gained her status from her father, marries a status Mohawk man, she will gain status as a status Mohawk woman and lose her status as Cree. If she were to divorce or become widowed, she would lose both her status as a Cree and Mohawk woman.[291] If a woman is widowed, under The Indian Act 1951 she would lose her right to live on the reserve unless she were to marry another status man.

The legislation enacted by the Canadian government was deliberate in its goal to dismantle the strength of Indigenous peoples' society. Much of their strength was reliant on the power and influence that women held within their communities, so dismantling their power and forcing Indigenous peoples to abandon traditions and cultures to adopt European patriarchal culture ultimately served the interest of the government. Although the purposeful language and the concept of Indian status created under The Indian Act 1876 were deliberate moves which unjustly targeted Indigenous women and encroached upon the sovereignty of Indigenous peoples, it failed to crush the spirit of Indigenous women. Indigenous feminism seeks to honour the traditions lost by hundreds of years of colonialism and aims to restore the power and honour that women once held in traditional Indigenous society.

Bill C-31:

This bill ceased to address three major issues: gender discrimination of The Indian Act 1985, to restore Indian status to those who had been forcibly enfranchised due to previous discriminatory provisions, and to allow bands to control their own band membership as a step towards self-government.[292]

Due to the tireless efforts of Indigenous women such as Mary Two-Axe Earley, Yvonne Bedard, Jeanette Corbiére-Lavelle, and Sandra Lovelace, The Indian Act 1985 was amended with the passing of Bill C-31. This bill made amendments to The Indian Act 1985 to match the

[289] *Ibid*, Indian Act 1876.
[290] Linc Kesler, Karmen Crey, Erin Hanson, 'Bill C-31' (2009) <https://indigenousfoundations.arts.ubc.ca/the_indian_act/#whitepaper>accessed November 24th, 2023.
[291] Joanne Barker, 'Gender, Sovereignty, Rights: Native Women's Activism Against Social Inequality and Violence in Canada' (2008) 60 AQ 259., The Indian Act 1876.
[292]Linc Kesler, Karmen Crey, Erin Hanson, 'Bill C-31' (2009) <https://indigenousfoundations.arts.ubc.ca/the_indian_act/#whitepaper>accessed November 24th, 2023.

provisions of equality that were included in the Canadian Charter of Rights and Freedoms [293] and gave Indian women back the status which they had lost when they had married men that did not have status.[294]

In 1982, the Canadian constitution was amended to include the Canadian Charter of Rights and Freedoms.[295] Section 15 of the Canadian Charter of Rights and Freedoms [296] states that every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability'.[297] Section 15 made the Canadian government address the discriminatory sections of The Indian Act 1985, which was influenced by *Lovelace v. Canada*[298]. Finally in April 1985, Bill C-31 was passed, which addressed gender discrimination in The Indian Act 1985.

Since the original Indian Act 1876 had taken status away from countless women over many generations, the government implemented a complex and needlessly convoluted new status system. Under Bill C-31 there became a classification of Indian status as 6(1) and 6(2). This system did nothing to solve the problem, it only delayed the loss of status for one to two generations.

Conclusion

The effects of the colonisation on Indigenous women continue to be seen today. While the idea behind the several amendments to The Indian Act 1876 were to reconcile the suffering which Indigenous communities have endured collectively, Indigenous women are still having to fight for impartiality. The work of the modern Indigenous woman is to restore the traditional understanding of the roles of men and women wherein women were honoured and revered for their ability to give birth. It is important for these beliefs to be revived because the value placed on women for their ability to give birth symbolised a woman's ability to nurture, not only

[293] Canadian Charter of Rights and Freedoms 1982.
[294] Lynn, Gehl, 'The Queen and I: Discrimination Against Women in the Indian Act Continues' (2000) 20 CWS 64., ibid.
[295] Linc Kesler, Karmen Crey, Erin Hanson, 'Bill C-31' (2009) <https://indigenousfoundations.arts.ubc.ca/the_indian_act/#whitepaper>accessed November 24th, 2023.
[296] Canadian Charter of Rights and Freedoms 1985, s 15.
[297] Linc Kesler, Karmen Crey, Erin Hanson,' Bill C-31' (2009) <https://indigenousfoundations.arts.ubc.ca/the_indian_act/#whitepaper>accessed November 24th, 2023.
[298] *Lovelace v. Canada* (1985) 68 International Law Reports 17.

children but also the community and the earth. This belief saw women as the centre of the nation.[299] As seen in this paper, although there have been many attempts made by the Canadian government to amend their relationship with Indigenous communities, there is still significant work that needs to be done in order for the effects of colonialism to be erased.

[299] Lisa J Udel, 'Revision and Resistance: The Politics of Native Women's Motherwork' (2001) 22 FB 43.

Table of Authorities

Cases

Descheneaux v. Canada, 2015 QCCS 3555

Lovelace v. Canada (1985) 68 International Law Reports 17

Statutes

The Indian Act 1876

The Indian Act 1951

The Indian Act 1985

Bill C-31, An Act to Amend the Indian Act 1985

Bill C-3, Gender Equity in Indian Registration Act 2011

Bill S-3, Gender Equity in Indian Registration Act 2017

Canadian Charter of Rights and Freedoms

Bibliography

Anderson K and Campbell M, *Life Stages and Native Women: Memory, Teachings, and Story Medicine* (Winnipeg: University of Manitoba Press 2011).

Kelm M and Smith K, *Talking Back to the Indian Act: Critical Readings in Settler Colonial Histories* (University of Toronto Press 2018).

Journal Articles

Barker J, 'Gender, Sovereignty, Rights: Native Women's Activism Against Social Inequality and Violence in Canada' (2008) 60 AQ

Elk-Young Bear L, 'There Is No 'We': V-Day, Indigenous Women and the Myth of Shared Gender Oppression' (2014) MVC.

Magee K, 'They Are the Life of the Nation: Women and War in Traditional Nadouek Society' (2008) 28 CJNS 119.

Udel L, 'Revision and Resistance: The Politics of Native Women's Motherwork' (2001) 22 FB 43.

Internet Sources

Kesler L and Crey K, Hanson E, 'Bill C-31' (2009) <https://indigenousfoundations.arts.ubc.ca/the_indian_act/#whitepaper>accessed November 24th, 2023.

Ogg A, *Cree Literacy Network,* (April 19th, 2013) <https://creeliteracy.org/2013/04/19/iskwewak-women/#:~:text=The%20keeper%20of%20the%20lodge,the%20Cree%20word%20for%20heart.> accessed November 24th, 2023.